No. 18-_____

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Are the various legal claims articulated by the three-judge district court unmanageable?

2. Did the three-judge district court err when, in granting plaintiffs' motion for summary judgment, it resolved disputes of material fact as to multiple elements of plaintiffs' claims, failed to view the evidence in the light most favorable to the non-moving party, and treated as "undisputed" evidence that is the subject of still-unresolved hearsay and other evidentiary objections?

3. Did the three-judge district court abuse its discretion in entering an injunction despite the plaintiffs' years-long delay in seeking injunctive relief, rendering the remedy applicable to at most one election before the next decennial census necessitates another redistricting?

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs: O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Jr., Kat O'Connor, Alonnie L. Ropp, and Sharon Strine;

Defendants: Linda H. Lamone, State Administrator of Elections, and David J. McManus, Jr., Chairman of the Maryland State Board of Elections.

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JURISDICTIONAL STATEMENT

In this case, a fractured three-judge district court adopted unprecedented and unworkable theories of First Amendment retaliation in striking down Maryland's 2011 congressional districting plan on the basis of partisan gerrymandering. Not only do the court's three separate opinions suffer from significant errors, the court's injunction imposes "traditional criteria for redistricting" not found in the Constitution nor any statute, and places unprecedented restrictions on what information legislators may consider in redrawing district lines. Given the multiple and substantially contradictory opinions and theories generated by the three-judge district court, this Court's plenary review is needed to supply Maryland's officials and legislators with essential guidance on what they are permitted to consider in crafting a congressional districting plan.

Last term, on appeal in this same case, this Court undertook plenary review of the three-judge court's denial of plaintiffs' request for preliminary injunctive relief. The lower court had denied relief because it could not conclude that plaintiffs were likely to succeed on the merits and because then-pending *Gill v. Whitford*, 138 S. Ct. 1916 (2018), might "set forth a 'framework' by which plaintiffs' claims could be decided[.]" *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018). This Court affirmed the order denying preliminary relief on grounds that included plaintiffs' "years-long delay" in pursuing injunctive relief, their failure to plead their First Amendment claim until 2016, and the reasonableness of withholding relief "to wait for this Court's ruling in *Gill* before further adjudicating plaintiffs'

claims" and thereby avoid "a needlessly 'chaotic and disruptive effect upon the electoral process.'" *Id.* at 1944, 1945 (citation omitted). As it turned out, however, this Court's decision in *Gill* did not articulate the correct standard to apply in evaluating a partisan-gerrymandering claim.

On remand from this Court, the three-judge court decided already-pending cross-motions for summary judgment. By that time, this Court had been asked to review a partisan-gerrymandering decision of a North Carolina three-judge court, which had recognized and adjudicated four distinct varieties of a partisan-gerrymandering claim. *Rucho v. Common Cause*, No. 18-422. Nevertheless, the court below forged ahead, granted summary judgment to plaintiffs, and entered a permanent injunction against Maryland's 2011 plan. The court produced two incompatible majority opinions, and a third opinion concurring in both. In the process, the court recognized a new, additional type of injury for the retaliation claim it had earlier recognized: denial of First Amendment associational rights.

OPINIONS BELOW

The district court's summary judgment opinions are available in the Westlaw database at 2018 WL 5816831. App. 1a-77a. Previous opinions are reported at 266 F. Supp. 3d 799 (D. Md. 2017), and 203 F. Supp. 3d 579 (D. Md. 2016). App. 82a-171a, 172a-225a.

JURISDICTION

The district court issued its decision on November 7, 2018. Appellants filed their notice of appeal on November 15, 2018. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

1. This case is the last of several challenging Maryland's 2011 congressional districting plan, enacted in light of the 2010 decennial census. 2011 Md. Laws Spec. Sess. ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701–8-709 (2017 Repl. Vol.). In June 2012, in an earlier case, this Court summarily affirmed a three-judge court's decision rejecting both racial-gerrymandering and partisan-gerrymandering claims. *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012). Although the 2011 plan made "it more likely rather than less likely that a Democrat . . . is able to prevail in the general election," Dkt.

186-2, 43:7-10, in *Fletcher*, the three-judge court rejected a claim that "the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District." *Id.* at 903.

Now, more than six years after *Fletcher*, a separate three-judge district court has reached the opposite conclusion and found that state officials "specifically intended to flip control of the Sixth District from Republicans to Democrats and then acted on that intent." App. 51a. In reaching that conclusion, the district court rejected evidence that the redrawn map met nonpartisan legislative goals and priorities, responded to concerns expressed by Sixth District voters and candidates, and returned that district to a more traditional configuration. Rejecting that evidence as "post-hoc rationalization," App. 55a, the district court found more believable plaintiffs' preferred narrative that Democrats designed the map with "a narrow focus" to "ensure the election" of an additional Democratic representative in the State's congressional delegation. App. 48a. That intent, the court believed, established that plaintiff Republican voters in the Sixth District had met their burden of proving a First Amendment retaliation claim of harm to their representational and associational interests. App. 56a, 64a.

2. It is undisputed that Maryland's 2011 congressional districting plan was the culmination of a months-long process of drafting work by State legislative staffers, followed by public hearings. Dkt. 104 ¶¶ 18-23, 26; Dkt. 186-2, 53:12-54:7. The final map met

significant state legislative goals related to the First, Fourth, Seventh, and Eighth Districts.

a. First, the 2011 plan eliminated a geographic anomaly, first introduced in Maryland's 1991 congressional districting plan and continued in the 2002 plan. That is, beginning in 1991, Maryland's First District had contained portions of both the eastern and western shores of the Chesapeake Bay, separated by no less than four miles of water and connected only by the Chesapeake Bay Bridge. This configuration protected an incumbent Republican representative, who had sought "'a district she believed she could win [in] the next election.'" *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 408 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) (Niemeyer, J., dissenting). The 2011 plan eliminated the Bay Bridge crossing by extending the northern portion of the First District westward into precincts formerly contained within the Sixth District.

Second, the 2011 plan accommodated the request of the Maryland Legislative Black Caucus to reduce from three to two the number of districts having territory in Prince George's County. *Fletcher*, 831 F. Supp. 2d at 902. This required shifts in population in the Fourth and Eighth Districts, as well as the Sixth District, which borders the Eighth.

Third, the 2011 plan retained as majority-minority districts both of Maryland's Section 2 Voting Rights Act districts (the Seventh and Fourth Districts),

which necessitated shifts elsewhere to accommodate population changes in those districts.

Fourth, the map developed through this process connected Frederick and Montgomery Counties via I-270 and made the I-270 corridor a major feature of the Sixth District. Dkt. 186-11 ¶ 9.

Finally, in addition to meeting these significant legislative goals, Governor O'Malley expressed that "part of [his] intent was to create a map that, all things being legal and equal, would, nonetheless, be more likely to elect more Democrats rather than less. Dkt. 186-2, 47:2-5.

b. The final map also responded to concerns expressed during public hearings. Sixth District voters had "advocated for replacing the part of the Sixth District stretching east into Baltimore and Harford Counties, and perhaps even some or all of Carroll County, with territory from Montgomery County." App. 19a. The residents explained that these changes were needed to "mak[e] it viable for someone to reach the voters, and in terms of better representing the population." App. 20a. A former plaintiff in this action, Stephen Shapiro, described the associational harms caused by the then-existing map and lamented the "decreased turnout and interest" in the general election caused by packing in the Eighth District, which yielded results he characterized as "usually a foregone conclusion." Dkt. 186-3, 66. Other Sixth District Democrats felt "shut out of the process" because "their politics weren't represented at all at the national level." *Id.* at

27. One Democratic candidate explained that the then-existing map made it difficult to campaign because the former Sixth District encompassed a huge swath of geographic territory centered on two different metropolitan areas. *Id.* at 21-24; *see id.* at 12, 16-17.

3. The congressional redistricting statute was enacted in substantially the same form as proposed, and it was then petitioned to statewide referendum, with a sizable majority of voters approving the legislation in the November 2012 election. App. 22a-23a. The plan won voters' support in areas throughout the State, with majorities favoring the plan in 22 of Maryland's 24 counties, including three of the five counties that, prior to the 2011 redistricting, were located wholly or partly within Maryland's Sixth District.[1] Dkt. 104 ¶ 39.

4. The subsequent elections reflected a more invigorated electorate, with the new Sixth District's voters favoring Republicans in some races and Democrats in others. *See* Dkt. 186-19, 11. In the counties included in the former Sixth District, Republican voter registration increased year-over-year from 2010 to 2016, Dkt. 186-50, and turnout among Republicans increased between the 2008 and 2012 presidential elections, Dkt. 186-51. Although turnout in the 2014 gubernatorial primary was down statewide, from

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[1] *See* http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Dec. 1, 2018).

25.35% in 2010 to 21.81% in 2014,[2] Republican turnout in Garrett, Allegany, and Washington Counties outpaced Democratic turnout in the 2014 gubernatorial primary. *Id.* And, notwithstanding small variations in contributions to local Republican central committees, contributions to then-incumbent Republican Congressman Roscoe Bartlett's campaign committee in 2012 were more than *twenty-five times* those received in 2010.[3]

Post-redistricting, plaintiffs maintained or increased their own associational activities. All the plaintiffs voted regularly after the 2011 redistricting. Dkt. 186-20, 11:19-12:10; Dkt. 186-43, 10:21-11:1; Dkt. 186-44, 13:15-17; Dkt. 186-25, 14:17-15:16; Dkt. 186-24, 11:6-12; Dkt. 186-45, 18:12-18; Dkt. 186-36, 12:10-17. When Plaintiff DeWolf became aware of the referendum effort, he was inspired to take an active role in politics for the first time and subsequently became a member of the Washington County Republican Central Committee and the Washington County Republican Club. Dkt. 186-43, at 13:15-14:14; 24:2-5. Plaintiffs Ropp and Strine were also active in local Republican

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[2] *Compare* https://elections.maryland.gov/elections/2010/turnout/primary/2010_Primary_Statewide.html *with* https://elections.maryland.gov/elections/2014/turnout/primary/GP14_turnout_statewide_by_party.xls.

[3] *Compare* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ (Post-General 2010, reporting $46,091.96 in total contributions for reporting period and election cycle-to-date) *with* http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/ (Post-General 2012, reporting $1,185,434.87 in same).

political campaigns both before and after the redistricting. App. 26a-27a.

5.a. The plaintiffs filed this action in November 2013. On December 8, 2015, this Court issued its decision reversing dismissal of the first amended complaint and remanding, *Shapiro v. McManus*, 136 S. Ct. 450 (2015).

b. In March 2016, plaintiffs filed a second amended complaint, asserting for the first time their First Amendment retaliation claim alleging unlawful vote dilution. App. 84a. They asserted that the drafters of the 2011 plan "purposefully and successfully flipped [the District] from Republican to Democratic control" by "moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations," thereby "diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." App. 181a. (brackets in original).

The district court denied defendants' motion to dismiss the second amended complaint in August 2016. App. 172a-225a. The majority held that a judicially manageable standard existed to adjudicate the plaintiffs' vote-dilution (or "representational-rights") claim. Under that standard, plaintiffs must show that (1) "those responsible for the map redrew the lines of" a plaintiff's district "with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated"; (2) "the challenged map diluted the votes of the targeted citizens to such a degree

that it resulted in a tangible and concrete adverse effect"; and (3) "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." App. 199a. That decision did not address any claim premised on an injury to plaintiffs' associational rights.

Nine months after the court's decision, on May 31, 2017, the plaintiffs filed a motion for preliminary injunction and to advance and consolidate the trial on the merits, or in the alternative, for summary judgment. Dkt. 177. After oral argument, the district court denied the request for preliminary injunction, declined to dispose of the parties' fully briefed cross-motions for summary judgment, and entered a "stay pending further guidance" from this Court's disposition of *Gill v. Whitford*, No. 16-1161. App. 83a & n.1.

In denying preliminary injunctive relief, the court held that the plaintiffs "have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief" because they had "not made an adequate preliminary showing that they will *likely* prevail" on the merits of their First Amendment claim. App. 83a. The court deemed plaintiffs unlikely to succeed in carrying their burden of proving it was the alleged "gerrymander (versus a host of forces present in every election) that flipped the Sixth District, and, more importantly, that will continue to control the electoral outcomes in that district." App. 100a.

On August 25, 2017, the plaintiffs appealed the denial of the preliminary injunction. Dkt. 205. After hearing argument, this Court issued its June 18, 2018 *per curiam* opinion noting its jurisdiction and affirming the district court's denial of the preliminary injunction. *Benisek*, 138 S. Ct. 1942. This Court concluded that, even assuming that plaintiffs were able to show a likelihood of success on the merits, their delay in seeking injunctive relief and the public's interest in orderly elections supported the district court's denial of injunctive relief and stay of proceedings pending this Court's decision in *Gill*. *Id.* at 1944-45.[4]

6.a. On remand, the parties requested leave to brief the district court on how this Court's *Benisek* and *Gill* rulings affected the pending summary judgment motions. The plaintiffs also informed the district court that no further discovery would be necessary. Dkt. 209, 1. Plaintiffs' supplemental briefing continued to press their vote-dilution claim, on which the district court had previously focused. Dkt. 210, 7-19. But plaintiffs also asserted a new claim premised on injury to their associational rights, for which the evidentiary record was less developed. *Id.* at 19-22.

Attempting to buttress their new associational-rights claim, plaintiffs submitted turnout data retrieved from the Maryland State Board of Elections'

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[4] On that same day, this Court also issued its ruling in *Gill*, 138 S. Ct. 1916, vacating and remanding to allow plaintiffs to demonstrate "concrete and particularized injuries" to establish standing to assert their partisan-gerrymandering claims. *Id.* at 1934.

website, together with lay opinion testimony from one of their attorneys purporting to analyze that data to show declines in Republican turnout in comparable elections before and after the implementation of the 2011 map. Dkt. 210-3; Dkt. 210, at 16-17. Plaintiffs also submitted campaign-finance reports retrieved from the Maryland State Board of Elections, which they claimed showed declines in contributions to local Republican Party committees in relevant areas before and after the implementation of the 2011 map. Dkt. 210-3, at 7-8; Dkt. 210, at 17-18. Defendants moved to exclude this evidence because the data was hearsay, outside the affiant's personal knowledge, not part of the discovery record, and not otherwise subject to judicial notice, and because the attorney's lay analysis of election-return data constituted inadmissible lay opinion testimony. Dkt. 215, at 1. The district court denied the motion to strike without commenting on the validity of the evidentiary objections, on the grounds that a bench trial obviates the need for strict adherence to evidentiary rules, and the panel could "simply strike the evidence later," if appropriate. Dkt. 219, 2.

b. The three-judge court awarded summary judgment to the plaintiffs on November 7, 2018. *See* App. 1a-77a; 78a-81a. Judge Niemeyer's opinion concluded that the plaintiffs were entitled to summary judgment on both of their First Amendment retaliation theories of vote dilution and impairment of associational rights. App. 4a. Judge Bredar's opinion concluded that the plaintiffs were entitled to summary judgment on their associational rights theory alone,

App. 71a-76a; Judge Bredar criticized Judge Niemeyer's opinion for its causation analysis pertaining to both of plaintiffs' theories, App. 69a-70a.

With regard to the representational-rights claim, Judge Niemeyer applied the standard the district court developed at the motion-to-dismiss stage and concluded that plaintiffs had established each element of their claim. App. 48a. As to intent, he found that Maryland Democratic officials worked with "precise purpose" to "flip the Sixth District from safely Republican to likely Democratic." App. 48a, 49a.

Addressing injury, Judge Niemeyer concluded that the redrawn Sixth District "did, in fact, meaningfully burden [plaintiffs'] representational rights," App. 52a, even if the district had become more electorally competitive, because "Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting." App. 53a. He added that, although not essential to the conclusion, "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting provides additional evidence" of injury. *Id.*

Finally, as to causation, Judge Niemeyer found that only retaliatory intent explained the Sixth District's boundaries. App. 54a-56a. In so ruling, he rejected as "utter[ly] implausib[le]," the State's evidence of alternative motivations, described above, for the redrawing of the district, including the western extension of the First District into territory previously

occupied by the Sixth District "to prevent the new First District from crossing the Chesapeake Bay," and "grouping residents along the Interstate 270 corridor," who previously resided in separate districts, into the Sixth District. App. 55a. He deemed the State's evidence of alternative motivation irrelevant in light of "the undisputed fact" that "the redistricting operation was guided by the expressed plan to protect existing Democratic seats and flip the Sixth District from Republican to Democratic Control." *Id.*

Addressing the associational-rights claim, Judge Niemeyer articulated a standard similar to the one the district court established for evaluating plaintiffs' representational-rights claim, except that "in lieu of the harm involving a burden on representational rights, [plaintiffs] must prove a harm involving a burden on their associational rights," namely, "that the challenged map burdened [their] ability to associate in furtherance of their political beliefs and aims." App. 59a. Plaintiffs satisfied that burden, he explained, because several indicators of "voter engagement in support of the Republican Party" in the Sixth District "dropped significantly." App. 62a. These indicators included voter turnout data and fundraising data—including data that was the subject of the State's motion to strike in advance of the summary judgment hearing, *see* Dkt. 215-1; App. 28a, 63a (citing fundraising data submitted with supplemental briefing); App. 74a-75a (concurring opinion of Judge Bredar citing the same).

Turning to remedy, Judge Niemeyer concluded that plaintiffs had satisfied the requirements for

injunctive relief. App. 64a-65a. He opined that plaintiffs' delay in pursuing relief need not be considered in determining whether to enter a permanent injunction, and, contrary to this Court's conclusion, *Benisek*, 138 U.S. at 1944, found that the case's "protraction cannot be attributed to the plaintiffs[.]" App. 66a. According to Judge Niemeyer, an election in 2020 with the current map—even if only for one election cycle—would irreparably harm plaintiffs, whereas ordering a new map for the 2020 election would not unduly disrupt the election process, despite the inevitable need to redraw that map yet again to reflect results of the 2020 census. App. 65a-67a.

In awarding judgment to plaintiffs, the district court enjoined the State from conducting any further elections under the 2011 map, and directed the State to submit for the district court's approval a new congressional districting plan that redraws the boundaries of the Sixth District "applying traditional criteria for redistricting . . . and without considering how citizens are registered to vote or have voted in the past or to what political party they belong." App. 78a-79a. If the State fails to submit a map, or if the district court declines to approve the map, a court-appointed commission will assume the responsibility of drawing and submitting a map to the three-judge court for approval. App. 79a-80a.

c. On November 15, 2018, the defendants filed a notice of appeal, App. 226a, and filed a consent motion to stay the district court's judgment during the pendency of the appeal, Dkt. 226. On November 16, 2018,

the district court granted in part the stay motion, and stayed the proceedings until the earlier of this Court's disposition of the appeal or July 1, 2019. Dkt. 230.

ARGUMENT

I. The Three-Judge District Court Did Not Set Forth a "Limited and Precise" Test for Adjudicating Partisan-Gerrymandering Claims.

The First Amendment retaliation formula adopted here has one principal disqualifying flaw: it does not resolve the "central problem" for a court attempting to address a claim of partisan gerrymandering. *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality op.). As the plurality emphasized in *Vieth*, and all justices there acknowledged in one way or another, that central problem is determining when the redistricting process, which is "root-and-branch a matter of politics," *id.* at 285, nonetheless "has gone too far," *id.* at 296.

A. The Three-Judge Court's Standards Would Preclude Districting for Proportional Representation, Which This Court Has Long Approved.

The standards employed in the three-judge court's two majority opinions do not amount to a "limited and precise test" for adjudicating partisan-gerrymandering claims, primarily because, however one parses their contradictory analyses, they insist on proscribing

activity that this Court has repeatedly held to be permissible.

In *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), the Court rejected a challenge to a Connecticut proportional districting plan that drew "virtually every" line with "conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." In upholding the plan, the Court refused to hold that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Id.* at 752; *see Gill*, 138 S. Ct. at 1927. But the three-judge court's standard would condemn the maps that this Court upheld in *Gaffney*, which were drawn with express reference to voters' political affiliations so as to achieve "a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752.

With regard to representational injury, Judge Niemeyer's opinion likened political vote-dilution to the numerical dilution caused by an overpopulated district and reasoned that citizens "have a right under the First Amendment not to have the value of their vote diminished *because of* the political views they have expressed through their party affiliation and voting history." App. 42a. Accordingly, his opinion reaffirmed the intent, effect, and causation standard he first articulated in *Shapiro*, 203 F. Supp. 3d at 596-97. App. 43a. In articulating this standard, the opinion did not define what constitutes a "tangible and concrete adverse

effect" in this context. Instead, it merely referenced similarly indeterminate language—"*the plaintiffs must show only that their electoral effectiveness—i.e., their opportunity to elect a candidate of choice—was meaningfully burdened*," App. 52a—before simply announcing that the element was satisfied in this case, App. 53a. This standard allows for no consideration of party affiliation and thus, it is inconsistent with the decision in *Gaffney*, which allowed consideration of party affiliation to achieve proportional representation.

The three-judge court's associational rights claim suffers from the same defects. In addition to the same "intent" and "causation" elements required for a vote-dilution claim, the associational-rights standard looks to whether "the challenged map burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims." App. 59a, 72a. Specifically, the court concluded[8] that the "atmosphere of general confusion and apathy" that resulted from the redistricting caused (unmeasured and unspecified) decreases in "fundraising, attracting volunteers, campaigning, and generating interest in voting." App. 63a.

But any redistricting, for any reason, risks generating an "atmosphere of general confusion and apathy," *id.*, among those residents who are reassigned to different districts and must therefore shift their associational activities, at least with regard to congressional campaigns, to the new geographic alignment. Thus,

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[8] As discussed below in part II, these conclusions were based on improper resolution of factual and evidentiary disputes.

evaluating associational harm rather than representational harm does not free the court of the significant line-drawing problems posed by the vote-dilution injury, because any redistricting impacts some individuals' associational rights. This problem of line-drawing cannot be averted merely by resorting to the three-judge court's element of partisan intent, which contains no means of distinguishing between permissible and impermissible political considerations.

Finally, as if to underscore the standard's incongruity with this Court's precedent, the three-judge court directed the State "to adopt promptly a new congressional districting plan that addresses the constitutional violations found here with respect to the Sixth District for use in the 2020 elections," App. 67a, and *expressly prohibited* the State from "considering how citizens are registered to vote or have voted in the past or to what political party they belong" in doing so, App. 79a. The State is thus precluded from, for example, adopting a map that seeks to approximate the strengths of Democrats and Republicans statewide (as this Court permitted in *Gaffney*). The three-judge court's opinions and injunction fail to set forth workable standards for adjudicating partisan-gerrymandering claims, because they foreclose considerations that this Court has long held to be permissible.

B. The Three-Judge Court Impermissibly Assumes That Preexisting District Configurations Are the Constitutional Benchmark.

The intent and effects elements adopted by the three-judge court can be evaluated only with reference to the prior map. The three-judge court has stated that legislators may not intend "to flip" a challenged district "from safely Republican to likely Democratic." App. 49a. Judge Niemeyer's opinion reduces the concept to a zero-sum game: "It is impossible to flip a seat to the Democrats without flipping it away from the Republicans." App. 50a-51a. It is no less impossible to evaluate whether something was or was not intended to be "flipped" without reference to the previous redistricting plan. Similarly, with respect to vote-dilution injury, a plaintiff cannot show that she was "placed at a concrete electoral disadvantage," App. 52a, without consideration of the electoral advantages enjoyed under the prior map. So, too, does the associational harm require comparison to associational activity under the prior map to determine whether the new map "burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims." App. 59a; App. 75a (party members harmed if "severed from their preferred associates" in the prior district); *see* App. 61a-63a (comparing pre- versus post-redistricting data).

In all these respects, the three-judge court's opinions test the constitutionality of a redistricting plan by comparing the current districting plan to the status

quo ante. But there is no *constitutional* reason to believe a prior district "has any special claim to fairness," particularly where the old district "was formed for partisan reasons." *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 446-47 (2006) (Kennedy, J.). On the contrary, any standard that invests the prior district with the power to invalidate subsequent legislative acts altering its borders will almost inevitably yield absurd results. Among them are the impairment of a legislature's ability to remedy a past partisan gerrymander. Under the three-judge court's test, claims from those voters whose districts did not change, and are therefore still affected by the prior gerrymander, would be barred, because they could not show that their vote was diluted or their associational opportunities diminished compared to the prior districting map. But claims from voters who were newly in a political minority as the result of legislation *curing* a prior partisan gerrymander would be actionable because claimants would be able to demonstrate that the legislature could and did "flip" the makeup of their district intentionally. *See* App. 50a.

If that is so, the State would be unable to "avoid liability," because its interest in remedying past gerrymandering would be, in the three-judge court's estimation, not a "compelling government interest." App. 43a. Legislatures would then be *constitutionally precluded* from attempting to cure past political gerrymanders, and remedy for those past ills would be available, if at all, only from the courts. Such a result directly conflicts with "'what has been said on many

occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'" *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

If the goal of recognizing a partisan-gerrymandering claim is to remedy excessive or unfair partisanship, then prior districts are more likely part of the problem rather than the solution. Enshrining pre-existing maps as the constitutional touchstone for future redistricting may perpetuate the nationwide political dominance of one party. *See* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 Electoral Studies 329, 336, 337 fig. 4 (2016) (discussing the two major parties' relative control over states' redistricting processes).

The three-judge court's premise, that the constitutionality of a redistricting plan under consideration depends entirely on the configuration of the prior map, will not provide a judicially manageable test for determining partisan gerrymanders.

C. Neither of the Three-Judge Court's Dueling Standards Provides the Requisite Guidance to Legislators on How to Redistrict Within Constitutional Limits.

In adopting a standard based in First Amendment retaliation with no definition of what would constitute

impermissible effects, the three-judge court fell short of establishing a "limited and precise rationale" for adjudicating partisan-gerrymandering claims. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). Judge Niemeyer's opinion identified two types of potential injury: (1) a "meaningful[ ] burden" on the plaintiffs' "representational rights," which the court also described as "a concrete electoral disadvantage," App. 52a; and (2) a "burden[on] the targeted citizens' ability to associate in furtherance of their political beliefs and aims," App. 59a. The opinion further explained that there no longer need be any showing "that the linedrawing altered the outcome of an election," App. 52a, and thus abandoned a requirement imposed in both of the three-judge court's prior decisions, App. 108a-109a, 202a. As for the newly identified associational harm, the court relied only on (1) a drop in turnout in a single primary election in which the statewide turnout was also depressed, and in which Democratic turnout was lower than Republican turnout, App. 62a; (2) hearsay statements that non-plaintiffs experienced "a lack of enthusiasm," App. 62a; and (3) a singular statement from a singular plaintiff that he felt " 'disoriented' by and 'disconnected' from his new congressional district," App. 63a; *see* App. 74a-75a.

Judge Bredar's separate majority opinion does not illuminate. He asserts that adopting a test based in associational harm "poses no line-drawing problem," App. 71a, but requires only a showing that the District "deprives the disfavored group of voters of its 'natural political strength,' " App. 73a (quoting *Gill*, 138 S. Ct.

at 1938 (Kagan, J., concurring). Just as Judge Niemeyer's vote-dilution injury lacks any method to measure how much is too much, Judge Bredar provides no method for determining the "natural political strength" of any political association that would aid courts in determining whether that strength has been diminished, particularly where the decade preceding redistricting has seen considerable shifts in migration, commuting patterns, or demographics within a district. Both alternative paths provided below attempt to identify "a burden," but neither defines that burden "as measured by a reliable standard," something "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do." *LULAC*, 548 U.S. at 418 (Kennedy, J.).

For legislators interested in avoiding "an election-impeding lawsuit contending that partisan advantage was the predominant motivation," *Vieth*, 541 U.S. at 286 (plurality op.), a standard for measuring burden is indispensable. This need is acute because the identified burdens will be present, in some amount, in every redistricting. As explained more thoroughly in Brief for Appellees at 28-30, *Benisek*, 138 S. Ct. 1942 (No. 17-333), defining "vote dilution" as an injury without specifying any means to evaluate the quantity or impact of the asserted dilution does not present a judicially manageable standard. Moreover, here, the court's standard provides no practical limit on potential claims—a political group could bring suit alleging a "concrete electoral disadvantage," even if they consistently win

elections but must expend additional effort in order to do so.

The identified associational harms particular to the facts of this case are similarly unlimited. It will not be hard, after any redistricting, to identify a few members of any political party or association who find themselves newly in a congressional district different from that of their neighbors. Anyone whose residence is reassigned to a new district could feel "disoriented" by redistricting, and disenchantment with the political process is common enough to be found on either side of a district line. The court required no evidence that associations suffered an adverse impact to their membership, or evidence showing exactly how their members' activities were curtailed or limited. To the contrary, ample evidence shows that the newly competitive Sixth District increased participation in political associations and activities among the plaintiffs and in the general electorate. *E.g.*, *supra*, 7-9. If the evidence in this case meets the test for associational harm, then those harms will be present in each redistricting.

A legislature will face difficulty in demonstrating it has *not* acted with the intent the three-judge court prohibited. This Court has long recognized that direct inquiries into legislative "motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Broad and frequent inquiries into legislative motive "'undermine[] the 'public good' by interfering with the rights of the people to representation in the democratic process.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (citation omitted). A search for

retaliatory intent is especially fraught because it raises "the prospect of every loser in a political battle claiming that enactment of legislation it opposed was motivated by hostility toward the loser's speech." *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 842 (10th Cir. 2014), *abrogated in part on other grounds by Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). The three-judge court's standard endorsed a wide-ranging inquiry into legislative intent, relying on such varied sources as statements from legislators who did not hold leadership positions and were not involved in the map drafting, App. 20a-24a; legislators who opposed the proposed plan,[6] App. 24a; deposition testimony of a former Governor, App. 49a-50a; deposition testimony of a consultant who prepared a map *rejected* by Maryland decisionmakers, App. 48a; and Congressional aides' inadmissible e-mails that had no obvious relation to the Sixth District, App. 22a. These evidentiary sources are more problematic than even the legislative testimony admissible in an "extraordinary instance[]." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

The three-judge court describes their requisite intent standard as "retaliatory." Their expansive definition, which would encompass any intent to take an

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[6] *See Bryan v. United States*, 524 U.S. 184, 196 (1998) ("'The fears and doubts of the opposition are no authoritative guide to the construction of legislation.' . . . 'In their zeal to defeat a bill, they understandably tend to overstate its reach.'" (quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964))).

action "based on the persons' political affiliation and voting" if such an action "burden[s] their representational rights," does not derive from "well developed and familiar" First Amendment retaliation standards. *Baker v. Carr*, 369 U.S. 186, 226 (1962). Under those standards, a government official must act with "vengeful" intent to punish or fail to reward an individual "for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). But here, no government official examined individually the expressive activity of any plaintiffs or any association to which they belong. *See, e.g., Moss v. Harris County Constable Precinct One*, 851 F.3d 413, 421 (5th Cir. 2017) (no retaliation claim where government had no knowledge of the individual's expressive conduct). Moreover, there is no government official to whose intent the map may be attributed. Instead, the 2011 Congressional map was approved directly by the people of Maryland, including majorities in three majority-Republican counties within the Sixth Congressional District.[7]

II. The Three-Judge Court Erred by Departing from the Summary Judgment Standard When It Resolved Disputes of Material Fact and Made Credibility Findings.

In addition to the theoretical flaws in the three-judge court's adopted standards, reversal is necessary because the court committed a more extreme version

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[7] *See* https://elections.maryland.gov/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Dec. 1, 2018).

of the error for which this Court reversed a three-judge court's entry of summary judgment in *Hunt v. Cromartie*, 526 U.S. 541, 548-54 (1999). That is, the court below resolved issues of "disputed fact," "credited appellees' asserted inferences over those advanced and supported by appellants or did not give appellants the inference they were due," and otherwise engaged in "'[c]redibility determinations'" and "'the weighing of the evidence,'" which are functions for the trier-of-fact and "not suited for summary disposition." *Id.* at 552, 554 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). But unlike *Hunt*, where the court resolved disputed facts as to only one element of a racial-gerrymandering claim, *i.e.*, the legislature's "impermissible racial motivation," 526 U.S. at 552, the three-judge court here resolved disputed facts pertaining to multiple elements of plaintiffs' claims, and did so by crediting and relying on evidence that is the subject of still-unresolved hearsay and other timely objections to admissibility. The court selectively highlighted facts and drew inferences in plaintiffs' favor, in the face of contradictory evidence favorable to the State, which the court either discounted or chose not to mention.

Most fundamentally, like the court reversed in *Hunt*, the court below failed to adhere to the requirement that "in ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Id.* at 552 (quoting *Anderson*, 477 at 255). As *Hunt* suggests, this has added significance in a redistricting challenge, because of "'the sensitive nature of

redistricting,'" "'the presumption of good faith that must be accorded legislative enactments,'" and "'the intrusive potential of judicial intervention into the legislative realm'"—considerations that tend to "tip the balance in favor of" the need for a trial before "making findings of fact" adverse to defendants. 526 U.S. at 553 (quoting *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995)). Indeed, "summary judgment is rarely granted in a plaintiff's favor" in "racial gerrymandering claims," *id.* at 553 n.9; precedent suggests no reason summary judgment should be more lightly granted to plaintiffs bringing partisan-gerrymandering claims. Thus, even if plaintiffs' evidence "might *allow* the District Court to find" in their favor after a trial, summary judgment is "inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Id.* at 552-53 (emphasis in original). Rather than heed these concerns and accord defendants the requisite belief and benefit of inferences, the decision below both implicitly and expressly manifests *disbelief* of the defendants' evidence. *See, e.g.*, App. 50a (stating that "[t]he State's argument . . . rings hollow"). This error infects the three-judge court's conclusions as to all elements of plaintiffs' claims, including injury, intent, and causation.

For example, in addressing injury, the decision disregards defendants' showing, based on plaintiffs' own deposition testimony, that plaintiffs themselves had not suffered chilling or associational injury, but had, instead, become more politically active

post-redistricting. *See* Statement *supra* at 8-9. As the record also showed, the only evidence purporting to indicate chilling of political activity constituted inadmissible hearsay: plaintiffs' descriptions of what some unidentified persons said or felt about voting.[8] Dkt. 201, 16. Those descriptions convey statements by unidentified out-of-court declarants, offered for "the truth of the matter asserted," and thus are hearsay, Fed. R. Evid. 801(c), "inadmissible at trial" and "cannot be considered on a motion for summary judgment," *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991); *accord Vazquez v. Lopez-Rosario*, 134 F.3d 28, 33 (1st Cir. 1998); *see* Fed. R. Civ. P. 56(c)(1)(B), (2), (4). Rather than disregard these hearsay statements, or even venture to address defendants' hearsay objection, the summary judgment opinions of Judges Niemeyer and Bredar credit and rely upon, as proof of "harm to [plaintiffs'] associational rights," App. 61a, plaintiffs' repetition of "unattributed statements," which "cannot be admissible." *Vazquez*, 134 F.3d at 34. *See* App. 26a ("'we met somebody who said, it's not worth voting anymore'" (quoting Strine Dep. 61)); App. 62a (same); App. 63a ("she frequently met potential Republican voters who 'didn't want to participate that time because it seemed too confusing'") (quoting Ropp. Dep. 37-38)); App. 27a (same); App. 74a (crediting same hearsay statements). The court employed the

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[8] The only non-hearsay evidence plaintiffs presented on this subject was deposition testimony of plaintiff Ned Cueman, who described himself as "disoriented" or "disconnected," Dkt. 177-1, 24, but conceded that post-redistricting he continued his political engagement by voting regularly, Dkt. 186-25, 14:17-15:16.

statements for "the truth of the matter asserted." *See* App. 62a (crediting these statements by unidentified declarants as "clear evidence" of "lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters"). The court never addressed defendants' hearsay objections to these statements nor identified any applicable exception to the hearsay rule. Instead, the court most inaccurately characterized these hearsay statements as among "undisputed facts of record." App. 61a.

Similarly, to demonstrate that Republican political participation in the Sixth District remained comparatively undeterred after the 2011 redistricting, defendants presented evidence showing increases in the district's Republican voter registration and Republican voter turnout in general elections. *See* Dkt. 186-50; 186-51. Instead of acknowledging this evidence, the court below made two choices that distort the record to defendants' detriment: (1) by looking only at Sixth District Republican voters' low turnout in the 2014 primary, App. 28a, without comparing it to available public record evidence that Democratic turnout was even lower in that same primary,[9] and (2) by crediting hearsay information on campaign contributions, *id.*, which plaintiffs presented for the first time through an affidavit of counsel submitted with supplemental

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[9] *Compare* https://elections.maryland.gov/elections/2010/turnout/primary/2010_Primary_Statewide.html *with* https://elections.maryland.gov/elections/2014/turnout/primary/GP14_turnout_statewide_by_party.xls.

briefing filed more than 13 months after the close of discovery, approximately a year after cross-motions for summary judgment were briefed, and two weeks after plaintiffs declined the court's invitation to reopen discovery.

Far from being undisputed, the referenced campaign-finance information was the subject of defendants' motion to exclude on grounds of hearsay, the affiant's lack of personal knowledge, and the information's widely recognized inaccuracy, and because campaign-finance reports are unsuitable for judicial notice. Dkt. 215-1. The court's order denying that motion did not indicate whether the court deemed defendants' evidentiary objections valid. Dkt. 219. Instead, it merely cited cases referring to relaxation of standards governing the court's gatekeeper role for expert testimony in a bench trial (a concept inapplicable to the hearsay objections raised in the motion), before concluding that "the Court can simply strike the evidence later," "[i]f determined to be problematic." *Id.* at 2. None of the court's cited cases suggest any relaxation of the need to exclude hearsay in a bench trial. *See Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (Hearsay "is not" "admissible in a bench trial" under Rule 802 and "neither this rule nor any other rule or statute creates an exception for bench trials."). Moreover, because the campaign-finance evidence was submitted in the final round of briefing permitted by the court, long after the close of discovery, defendants had no opportunity to probe the information's veracity through discovery or submit rebuttal evidence. In any

case, the selective campaign-finance information cited by plaintiffs' counsel is unrepresentative of overall campaign contributions since redistricting. For example, other campaign-finance reports on file show that contributions to Roscoe Bartlett's campaign committee *increased* by 2,500% between 2010 and the post-redistricting 2012 election.[10]

Similar departures from the summary judgment standard plague the court's intent analysis. For example, the court repeated the error that necessitated reversal in *Hunt* by impermissibly giving greater weight to plaintiffs' evidence of the "legislature's motivation"—"a factual question"—while failing to accept defendants' alternative "motivation explanation as true, as the District Court was required to do in ruling on [plaintiffs'] motion for summary judgment." 526 U.S. at 549, 551. The court embraced plaintiffs' characterization of "the mapmakers' intent," App. 48a, and refused to accept as true, App. 50a-51a, defendants' showing that changes in the Sixth District's boundaries were driven by legitimate legislative decisions, including the rejection of a Chesapeake Bay crossing; deference to Prince George's County residents' desire for their county to have two districts, neither of them shared by Montgomery County; and heeding constituents' public testimony expressing the importance of having a district to serve the I-270 corridor economic region, *e.g.*, Dkt. 186-11 ¶ 9; *see* Dkt. 201, 3-6 (discussing evidence of varied legislative motives). In so doing,

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[10] *See* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ and http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/.

the court weighed evidence. *See, e.g.*, App. 14a-16a, 48a-49a (relying heavily on deposition testimony of Congressional staffer Eric Hawkins, Dkt. 177-4, while failing to acknowledge material contradictory testimony in the affidavit of State legislative staffer Yaakov Weissmann, Dkt. 186-11, and elsewhere in the record); App. 13a, 55a (selectively crediting and disbelieving the former Governor's deposition testimony). Once again, the court credited inadmissible hearsay to which defendants had objected, Dkt. 201, 5-6, and did so without addressing the hearsay objection, *see* App. 22a (quoting foundationless hearsay email, Dkt. 177-58).

Perhaps the decision's most conspicuous failure to acknowledge a genuine dispute of material fact appears in its finding that plaintiffs have satisfied the causation element. App. 54a-56a. This conclusion directly contradicts the court's previous determination, based on the same evidentiary record, that it "is not persuaded" that plaintiffs "have met their burden of proof with respect to causation." App. 100a. If, as it previously acknowledged, "the Court cannot say that it is *likely* that Plaintiffs will prevail on this element—only that they *might*," *id.*, then, at a minimum, "the evidence is susceptible of different interpretations or inferences by the trier of fact," and, consequently, "[s]ummary judgment in favor of the party with the burden of persuasion . . . is inappropriate[.]" *Hunt*, 526 U.S. at 553.

III. Plaintiffs' Unreasonable Delay in Earlier Phases of this Case Precludes Injunctive Relief.

The Court should also note jurisdiction and reverse because the three-judge court abused its discretion both in (1) erroneously concluding that harm caused by plaintiffs' delay has no bearing on the appropriateness of a permanent injunction, and (2) directly contradicting this Court's finding that "years-long delay" in this case "largely arose from a circumstance within plaintiffs' control." *Benisek*, 138 S. Ct. at 1944. App. 66a. Entry of an injunction is "a matter of equitable discretion," and success on the merits of a claim does not automatically entitle plaintiffs to injunctive relief "as a matter of course." *Benisek*, 138 S. Ct. at 1943. This principle applies equally to requests for preliminary and permanent injunctions. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."). Like preliminary injunctions, permanent injunctions are governed by "the four-factor test historically employed by courts of equity." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). This Court has long recognized that these principles apply to election law cases, including redistricting cases. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("equitable considerations" may justify withholding ultimate relief in redistricting case, even where plan violates constitution); *accord Benisek*, 138 S. Ct. at 1944 (principle that diligence is

a requirement for injunctive relief is "as true in election law cases as elsewhere").

Contrary to the three-judge court's assumption that it need not consider the effect of plaintiffs' delay on "the ultimate remedy," App. 66a, other courts have applied equitable principles, including laches, in withholding injunctive relief for constitutional violations when, as in this case, the relief would apply "for only the last election in the decade" prior to completion of the next decennial census. *Skolnick v. Illinois State Electoral Bd.*, 307 F. Supp. 691, 695 (N.D. Ill. 1969) (three-judge court); *Maryland Citizens for Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 610 (4th Cir. 1970) (same). In the face of "inexcusable and unreasonable" delay, "a challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored." *White v. Daniel*, 909 F.2d 99, 103 (4th Cir. 1990); *see Sanders v. Dooly County, Ga.*, 245 F.3d 1289, 1290 (11th Cir. 2001) ("over six years" delay justified denying injunction of districting plan); *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (three-judge court), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000).

Proximity to an upcoming census creates a presumption against ordering a map redrawn, because "two reapportionments within a short period of two years would greatly prejudice the [jurisdiction] and its citizens by creating instability and dislocation in the electoral system," "imposing great financial and logistical burdens," and jeopardizing "fair and accurate representation for the citizens" through the use of stale

census data. *White*, 909 F.2d at 104. Courts have recognized the public interest in avoiding injunctions that would necessitate resort to such data, even after a finding in plaintiffs' favor on a claim as well-established as one-person, one-vote. *Skolnick*, 307 F. Supp. at 695 (three-judge court finding plan unconstitutional for lack of population equality but declining to impose injunction); *see Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000) (Even where prior district boundaries were racially motivated, the "passage of six years" "does caution against wholesale alteration" of district lines "based on out-of-date census figures when the process will in any case have to be done in the immediate future" because of a new census.).

Since the June remand, no circumstance has arisen to alter this Court's evaluation of the balance of equities and weighing of the public interest in light of plaintiffs' dilatoriness. *Benisek*, 138 S. Ct. at 1944. This Court concluded that plaintiffs did not "show reasonable diligence," not only in belatedly requesting a preliminary injunction, but more significantly, in "fail[ing] to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Id.*

The findings supporting that conclusion apply equally to plaintiffs' request for permanent injunctive relief. First, "[a]lthough one of the seven plaintiffs . . . filed a complaint in 2013 alleging that Maryland's congressional map was an unconstitutional gerrymander, that initial complaint did not present the retaliation theory asserted here." *Id.* Second, the "newly presented claims" required, beginning in 2016 and at plaintiffs'

own insistence, "discovery into the motives of the officials who produced the 2011 congressional map." *Id.* Third, "plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief," *id.*, now has caused additional delay in their pursuit of permanent injunctive relief. Instead of "six years, and three general elections, after the 2011 map was adopted, and over three years since the plaintiffs' first complaint was filed," *id.*, it has been seven years, and four general elections, after the 2011 map was adopted, and nearly five years since the original complaint was filed. The loss of the additional election cycle was the direct consequence of plaintiffs' late-filed request for preliminary injunction, an optional litigation strategy that plaintiffs opted to pursue instead of pressing their claim for permanent injunction.

The three-judge court sought to justify its entry of injunctive relief, notwithstanding plaintiffs' delay, by declaring that this case's protracted procedural history "cannot be attributed to the plaintiffs, but to process." App. 66a. That finding directly contradicts this Court's assessment that "the delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Benisek*, 138 S. Ct. at 1944. The three-judge court's observation that plaintiffs presented a claim for permanent injunction in their 2013 complaint, App. 66a, does not absolve plaintiffs, because that "initial complaint did not present the retaliation theory asserted here," *Benisek*, 138 S. Ct. at 1944. And, though there remained time to

implement a new plan for the 2020 election when the three-judge court entered its injunction, the court ignored this Court's caution to consider "the legal uncertainty surrounding any potential remedy" when evaluating the impact to the state election system. *Id.* When the three-judge court entered its judgment, App. 78a, a jurisdictional statement had already been filed by defendants in a North Carolina redistricting case, where a three-judge court recognized four separate theories of a partisan-gerrymandering claim, and defendants seek review on grounds including nonjusticiability and lack of standing, among others. Even as those four different standards were poised for review by this Court, the court below added a fifth, and enjoined the State, while the exact contours of these plaintiffs' novel cause of action remained undefined. Under these circumstances, the injunction ordered was an abuse of discretion.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*, Plaintiffs,	*	
v.	*	Case No. 1:13-cv-03233-JKB
LINDA H. LAMONE, *et al.*, Defendants.	*	

COMMON CAUSE; THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW; THE CAMPAIGN LEGAL CENTER, INC.,

Amici Supporting Plaintiffs.

MEMORANDUM OPINION

Argued: October 4, 2018 Decided: November 7, 2018

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LLP, and Michael Li, Thomas P. Wolf, New York, New York, for Amicus The Brennan Center for Justice at N.Y.U. School of Law. Paul March Smith, Washington, D.C., for Amicus The Campaign Legal Center, Inc.

Before NIEMEYER, Circuit Judge; BREDAR, Chief District Judge; and RUSSELL, District Judge.

Judge Niemeyer wrote the opinion, in which Judge Russell joined. Chief Judge Bredar wrote a separate opinion, in which Judge Russell joined, concurring in the judgment. Judge Russell wrote a separate opinion, concurring.

NIEMEYER, Circuit Judge:

The plaintiffs in this action — seven registered Republican voters who lived in Maryland's Sixth Congressional District prior to the State's enactment of its 2011 congressional redistricting law — challenge the constitutionality of that law and, specifically, the way the State redrew the boundaries of the Sixth District. *See* Md. Code Ann., Elec. Law § 8-701 *et seq.* They contend that in enacting the law, State officials specifically intended to burden Republicans with the overarching goal of achieving a state delegation to the U.S. House of Representatives of seven Democrats and one Republican, as distinct from the previous six Democrats and two Republicans. To do so, the officials targeted Republican voters in the Sixth District by, on net, removing roughly 66,000 of them from the district and adding some 24,000 Democratic voters, thereby effecting a swing of about 90,000 voters and bringing about the single greatest alteration of voter makeup in any district in the Nation following the 2010 census. The

plaintiffs point out that before the redistricting, experts regarded the Sixth District as "Solid Republican" and after redistricting, as "Likely Democratic." Based on these factual allegations, the plaintiffs argue that in enacting the 2011 law, the State deliberately diluted their votes and burdened their associational interests based on their party affiliation and voting history, in violation of their First Amendment rights.

The parties have conducted and completed extensive discovery, and neither the plaintiffs nor the State has requested any more. Moreover, no party disputes the material facts in the record, although the parties do dispute the legal consequences that flow from them. Following discovery, the plaintiffs filed a motion for summary judgment, and the State filed a cross-motion for summary judgment.

This court conducted a lengthy hearing on the cross-motions for summary judgment on October 4, 2018, and now, for the reasons given herein, the court grants the plaintiffs' motion and denies the State's motion. The record shows that:

- The State specifically targeted voters in the Sixth Congressional District who were registered as Republicans and who had historically voted for Republican candidates.
- The State specifically intended to diminish the value of those targeted citizens' votes by removing a substantial number of them from the Sixth District and replacing them with Democratic voters for the purpose of denying, as a practical matter, the targeted voters the

opportunity to elect the candidate of their choice.

- The State gave effect to its intent by, on net, removing about 66,000 Republican voters from the Sixth District and adding 24,000 Democratic voters in their place.
- The State meaningfully burdened the targeted Republican voters' representational rights by substantially diminishing their ability to elect their candidate of choice.
- The State also burdened the Republican voters' right of association, as demonstrated by voter confusion, diminished participation in Republican organizational efforts in the Sixth District, and diminished Republican participation in voting, as well as decreased Republican fundraising.
- These injuries were the direct result of the State's purpose to convert the Sixth District from a solid Republican district to a Democratic district.

We thus conclude that the plaintiffs have sufficiently demonstrated that Maryland's 2011 redistricting law violates the First Amendment by burdening both the plaintiffs' representational rights and associational rights based on their party affiliation and voting history. Because the plaintiffs also satisfy the requirements for injunctive relief, we enter a judgment permanently enjoining the State from using the 2011 congressional redistricting plan after the 2018 congressional election and requiring it promptly to adopt

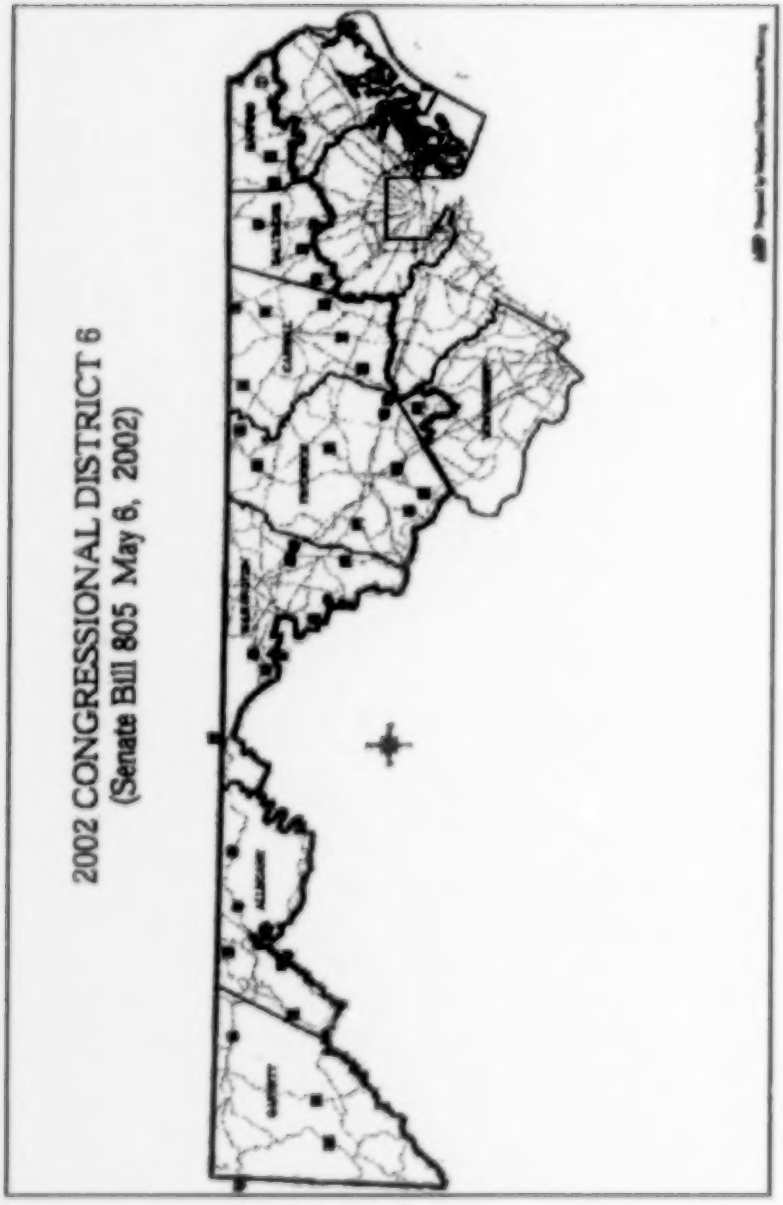
a new plan in conformance with this Memorandum Opinion for use in the 2020 congressional elections.

I. Facts of Record

A

The facts of record are not disputed. Following the 2010 decennial census, the State of Maryland redrew the lines of its 8 congressional districts and its 47 state legislative districts, as required to equalize the population in each district. In particular, the census showed that the Sixth Congressional District had grown somewhat since the prior census, having 10,186 more residents than the ideal adjusted population of 721,529 for a Maryland congressional district, a variation of 1.4%. Joint Stipulations ¶¶ 9, 52 (ECF No. 104). Thus, Maryland was required to remove a net of 10,186 residents from the Sixth District to achieve the required equal population for the District. With such a modest adjustment, however, the Sixth District would have remained a solid Republican district, which, together with the First District on the Eastern Shore of Maryland, would have given Maryland two reliably Republican districts.

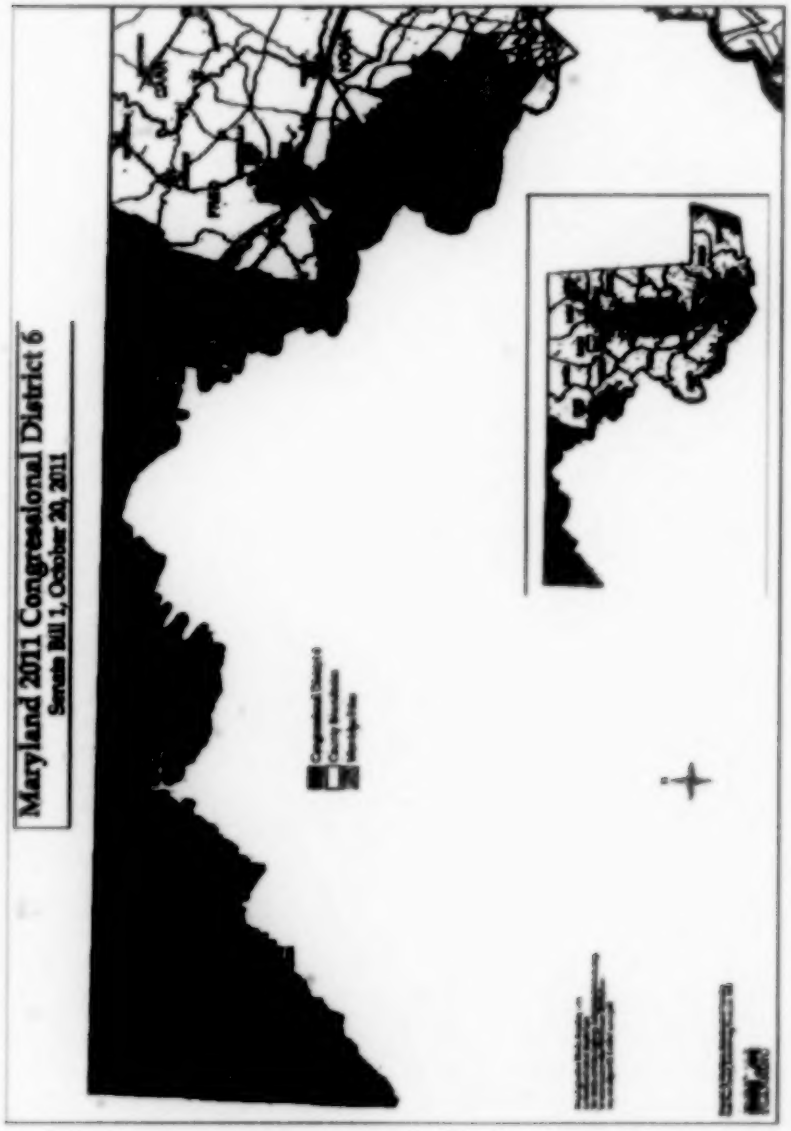
Since 1966, the Sixth District had always been configured to include all of Maryland's five most northwestern counties — Garrett, Allegany, Washington, Frederick, and Carroll Counties. *See* Expert Report of John T. Willis at 9 & app. A, maps 11–15 (ECF No. 186-17). After the 2002 redistricting, the District included this identifiable core of five counties, as well as a small pocket of northern Montgomery County and larger portions of Baltimore and Harford Counties, shown as follows:


2002 CONGRESSIONAL DISTRICT 6
(Senate Bill 805 May 6, 2002)

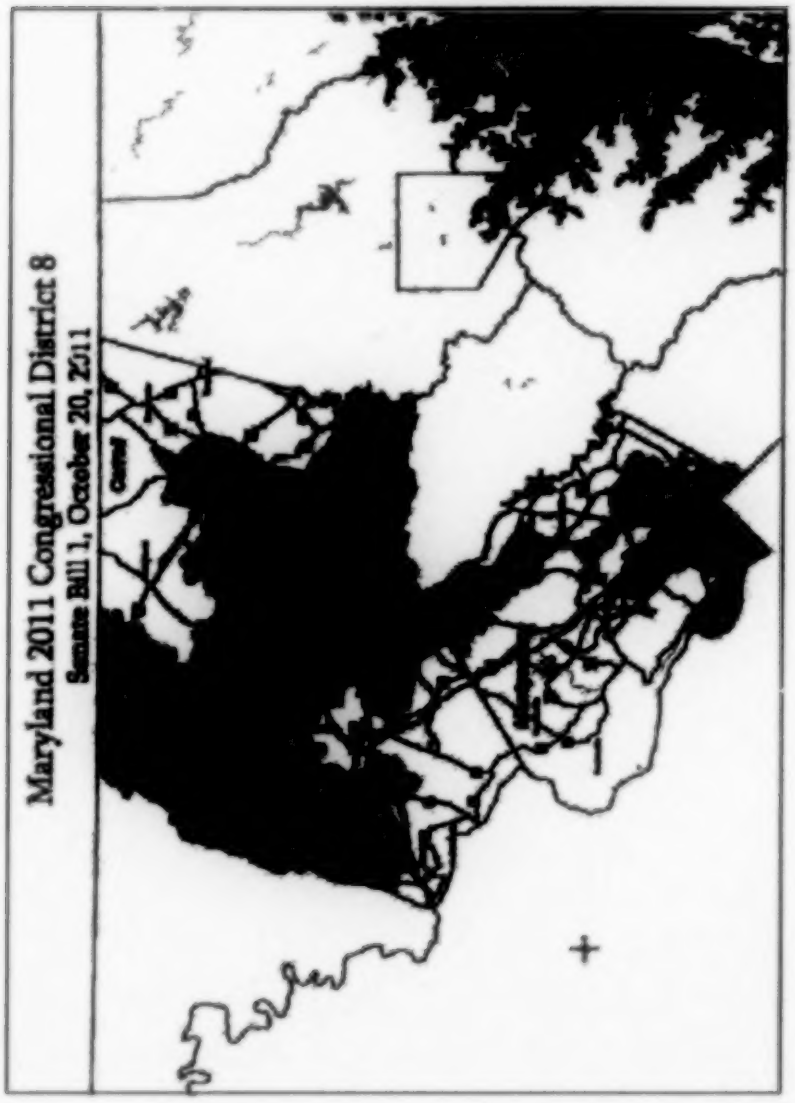
At the time of the 2010 congressional election — the last held prior to the 2011 redistricting — 47% of the Sixth District's approximately 446,000 registered voters were registered as Republicans, 36% were registered as Democrats, and 16% were registered as Unaffiliated, making the District the most Republican in the State. Joint Stipulations ¶ 10 & Ex. 2 at 2. Representative Roscoe Bartlett, a Republican, had continuously represented the District since 1993, and he won reelection in 2010 by a margin of 28%. *Id.* ¶ 8.

In creating the 2011 redistricting plan, the Democratic officials responsible for the plan redrew the Sixth District's boundaries far more dramatically than was necessary to remove 10,186 residents from the District. Under their plan, the Sixth District retained only one-half of its original population (specifically, the residents of Garrett, Allegany, and Washington Counties, as well as roughly half the population of Frederick County). The other half of the former Sixth District's population — roughly 360,000 residents — was moved to other districts. Approximately 60% of those removed — those from Frederick County and more than half the population of Carroll County — were shifted into the Eighth Congressional District, which had previously been confined almost entirely to Montgomery County. In place of those residents, the plan added to the new Sixth District approximately 350,000 residents from Montgomery County — the majority of whom had previously been assigned to the Eighth District. The exchange thus involved over 700,000 residents.

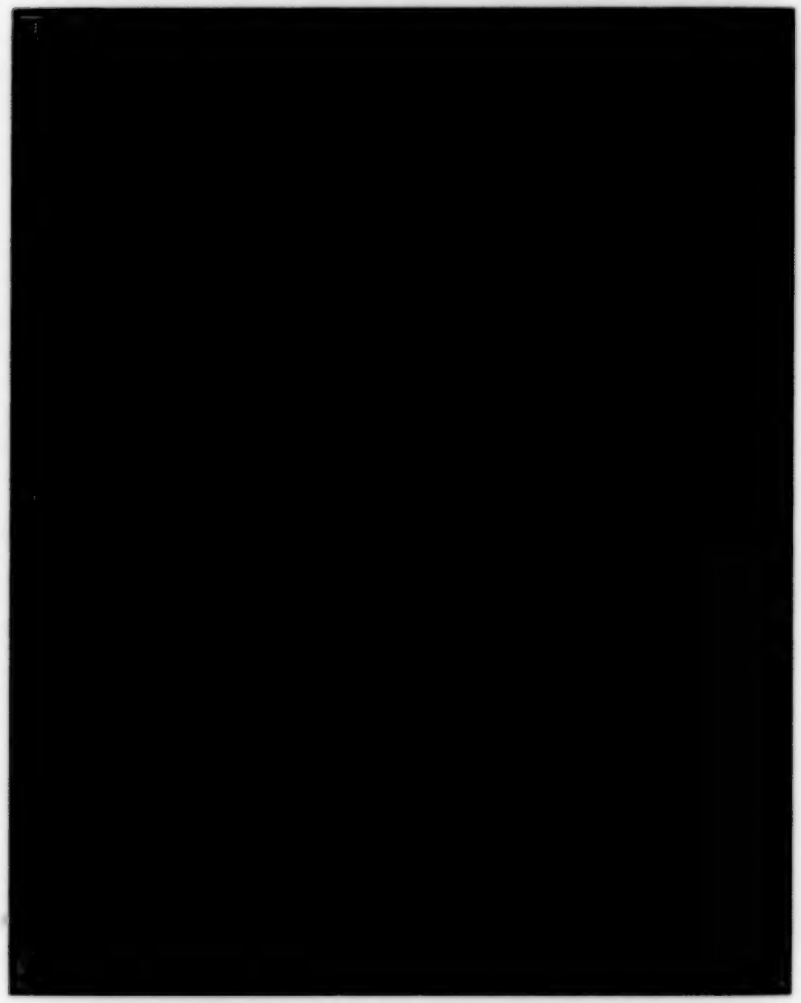
The final 2011 redistricting map for the Sixth District is shown as follows:



The new Eighth District is shown as follows:



Finally, the map as a whole is shown as follows:



The registered voters removed from the former Sixth District were predominately Republican, while those added were predominately Democratic. Specifically, in the precincts removed from the Sixth District,

there were on average approximately 1.5 times as many registered Republicans as Democrats. By contrast, in the precincts added to Sixth District, registered Democrats outnumbered Republicans by more than 2 to 1. In total, the reshuffling of the Sixth District's voters resulted in a net reduction of roughly 66,000 registered Republicans and a net increase of some 24,000 registered Democrats, for a swing of about 90,000 voters. *See* Opening Expert Report of Prof. Michael P. McDonald at 5, 11–12 (ECF No. 177-19); Opening Expert Report of Dr. Peter A. Morrison ¶ 134 & tbl. 1 (ECF No. 177-35). Thus, of the new Sixth District's roughly 437,000 registered voters, 33% were registered as Republicans, 44% were registered as Democrats, and 22% were registered as Unaffiliated. Joint Stipulations ¶ 53 & Ex. 19 at 2. And, in the new Sixth District, Democratic candidate John Delaney defeated Republican incumbent Bartlett by a 21% margin in the 2012 election. *Id.* ¶ 54. Delaney was narrowly reelected in 2014 with a margin of 1.5% but then won the 2016 election by a margin of 14%. *Id.* ¶ 55–56.

The Eighth District, to which the State had shifted the bulk of the Sixth District's removed voters, continued to be a reliable seat for Democrats. Prior to redistricting, registered Democratic voters outnumbered registered Republican voters in the Eighth District by almost 3 to 1 — 58% were Democrats, 20% were Republicans, and 21% were Unaffiliated. Joint Stipulations Ex. 2 at 2. After the redistricting, 51% of the registered voters were Democrats, 27% were Republicans, and 21% were Unaffiliated. *Id.* Ex. 19 at 2. Thus,

even though the number of registered Republicans in the Eighth District rose significantly after the transfer of Republicans from the Sixth District, registered Democrats still outnumbered registered Republicans by nearly 2 to 1.

The record shows that this readjustment of the voter composition of the Sixth District was specifically intended by Maryland Governor Martin O'Malley, a Democrat; by the Maryland General Assembly, controlled by Democrats; and by the Democratic members of Maryland's congressional delegation to achieve a 7 to 1 Democratic majority in Maryland's delegation to the U.S. House of Representatives.

As was the custom — and indeed the procedure specified by state law for redrawing state legislative districts — Governor O'Malley took responsibility for creating the 2011 congressional redistricting plan and submitting it to the General Assembly as a joint resolution for adoption. *See* O'Malley Dep. 8, 10–11 (ECF No. 177-3). He testified explicitly that he wanted to use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping either the First District on the Eastern Shore of Maryland or the Sixth District in western Maryland. *See, e.g.*, *id.* at 22–28. He confirmed that he "set out to draw the borders in a way that was favorable to the Democratic party." *Id.* at 9–10. As he stated:

> [T]hose of us in leadership positions in our party, the Speaker, the Senate President, the

> Democratic Dean of the Delegation, myself, Lieutenant Governor, we all understood that, while our — while we must fulfill our responsibility on redistricting, must be mindful of constitutional guidelines, restrictions, case law, statutes, it was also — part of our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them. Yes, that was clearly one of our many [goals].

Id. at 81. After brief consideration, Governor O'Malley rejected the notion of flipping the First District because the resulting district would have to jump across the Chesapeake Bay. *Id.* at 24–27. Consequently, "*a decision was made to go for the Sixth.*" *Id.* at 27 (emphasis added).

To carry out the process, Governor O'Malley appointed the Governor's Redistricting Advisory Committee as the public face of his effort, directing it to hold public hearings and recommend a redistricting plan. But at the same time, he "asked Congressman [Steny] Hoyer, as the dean of the [U.S.] House delegation," to "lead the effort . . . to inform the [Advisory Committee] about congressional redistricting" and "come up with a map that a majority of the congressional delegation supports." O'Malley Dep. 47–48; *see also* Willis Dep. 185–88 (ECF No. 177-14). And the record shows that the work produced under the direction of the Democratic members of Maryland's congressional delegation — including data reflecting how citizens in discrete areas of the State had voted in the past — played a central role in shaping the new Sixth

District. *See, e.g.*, Miller Dep. 97 (ECF No. 177-15) (testifying that the map "primarily was drawn by the congressional people").

Thus, while the Advisory Committee was holding public hearings across the State — indeed, even before it began — the Democratic members of Maryland's congressional delegation, led by Representative Hoyer, who has described himself as a "serial gerrymanderer," ECF No. 191-3, began their work to redraw the State's congressional map. Hoyer and other members of the delegation retained NCEC Services, Inc., a political consulting firm that provides "electoral analysis, campaign strategy, political targeting, and GIS [geographic information system] services" to Democratic organizations. ECF No. 177-17; *see also* Hawkins Dep. 28–36 (ECF No. 177-4); ECF No. 177-18. NCEC was specifically charged with drawing a map that maximized "incumbent protection" for Democrats and that changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican. It was given no additional instruction as to how to draw the map. Hawkins Dep. 40–42, 47–49.

The primary NCEC analyst assigned to the task, Eric Hawkins, analyzed various congressional redistricting plans to inform the Democratic members of the Maryland congressional delegation of how different options would change their districts, and he personally prepared between 10 and 20 different draft congressional maps using a GIS computer software program called Maptitude for Redistricting. Hawkins Dep. 36–38. Maptitude allows users to "[c]reate districts using

any level of geography," "[a]dd political data and election results," and "[u]pdate historic election results to new political boundaries." Joint Stipulations ¶ 28. With Maptitude, "data reflecting . . . citizens' political party affiliations and voting histories[] can be used to determine how the outcome of historical elections would have changed . . . if the proposed plan had been in place in prior years," *id.* ¶ 30, thus enabling users to predict accurately the likely outcome of future elections.

Hawkins specifically used a proprietary metric created by NCEC called the Democratic Performance Index ("DPI"), which measures how a generic Democratic candidate would likely perform in a particular district. *See* Hawkins Dep. 24, 110. As Hawkins explained, the DPI considers how "statewide candidates perform over time in competitive elections," is "weighted differently for different election years," and "take[s] into account past voting history in a state or a district." *Id.* at 24. The DPI thus "indicate[s] competitiveness or lack thereof" for Democratic candidates and is based on the principle that "observed party performance correlates with future party performance more strongly than any other single measure." ECF No. 191-7 at 1. It has proven quite predictive in practice. For example, in the 2016 congressional election, U.S. House Democratic candidates almost never won districts with a DPI below 50%, but won 92.5% of districts where the DPI was above 50%. *Id.* at 2. NCEC also calculates separate versions of the DPI specific to federal and state races — with the federal DPI "only

us[ing] federal races" and the state DPI "only us[ing] state races" — to better account for "ticket splitting." Hawkins Dep. 25–26.

Hawkins testified that he used the DPI to meet the dual "goals" given to NCEC — namely, to draw a map that would maximize "incumbent protection" for the Democrats currently representing Maryland districts in Congress and that would "chang[e] the make-up of Maryland's U.S. House delegation from six Democrats and two Republicans to seven Democrats and one Republican." Hawkins Dep. 40–42; *see also id.* at 47–49. With respect to this 7-1 goal, Hawkins' efforts focused on redrawing the Sixth District's lines to increase its federal DPI, *id.* at 102–03, which Hawkins calculated under the preexisting map as standing at 37.4%, indicating low Democratic performance and correspondingly strong Republican performance, *id.* at 88. Over the course of working with Maryland's Democratic congressional representatives and their staff, Hawkins prepared several different maps under which the Sixth District would have had at least a 51% federal DPI. *See, e.g., id.* at 97, 157–61. In preparing these draft maps, Hawkins considered neither "any measure of compactness," *id.* at 126, nor whether "there was a community of interest related to the I-270 corridor," *id.* at 128. Rather, "[t]he intent was to see if there was a way to get another Democratic district in the state." *Id.* at 230.

While maps were also proposed during this period by third-party entities, they resulted in a far lower federal DPI for the Sixth District and were not used

further. For example, a map proposed by the Maryland Legislative Black Caucus would have resulted in a federal DPI of 39% for the Sixth District and DPIs below 50% for 2 other districts, ECF No. 177-34, a proposal a senior congressional staffer worried would be "a recipe for 5–3, not 7–1," ECF No. 177-36.

Ultimately, the Democratic members of Maryland's congressional delegation proposed and forwarded to the state Democratic leadership at least one map prepared by Hawkins. *See, e.g.*, Weissmann Decl. ¶ 8 (ECF No. 186-11). Hawkins also traveled to Annapolis to brief a number of state legislative staffers on the proposal, *see* Hawkins Dep. 170–75, and assisted at least some of these staffers as they continued working on the congressional map, *see, e.g.*, ECF No. 191-6.

The record reflects that a group of staffers to the State's most senior Democratic leaders, including the Governor, was "tasked with developing a plan . . . that would be acceptable to the [Governor's Redistricting Advisory Committee]." Weissmann Decl. ¶ 9; *see also id.* ¶ 7. Significantly, these senior staffers were given a data file containing NCEC's proprietary DPI information for Maryland at the precinct level — the smallest geographic unit in Maryland (averaging around 3,000 people) at which election results are reported. *See id.* ¶¶ 4–5. This data file was loaded onto a laptop used by the staffers to generate maps, and this laptop also contained the Maptitude software and "party registration data and voter turnout data," including data at the census-block level — the smallest geographic unit used by the U.S. Census Bureau. *Id.* ¶¶ 3–5. State

Democratic officials, through their staffers, thus continued to use the DPI — as well as other information about how local groups of citizens had previously voted and the political party with which they were affiliated — to finalize a map for the Advisory Committee and ultimately the Governor.

One of the staffers involved in this process testified that after the group received a draft map that had been proposed by Maryland's congressional delegation, the group made a series of changes to the map — chiefly, keeping Washington County intact in the Sixth District; keeping the City of Frederick, but not its suburbs, intact in the Sixth District; connecting the City of Frederick with a swath of Montgomery County by orienting the Sixth District around the I-270 highway; and making adjustments so that the Eighth District no longer went into Prince George's County and the Fourth District no longer went into Montgomery County. Weissmann Decl. ¶ 9. While the staffer did not give testimony about whether the group aimed to carry out the Governor's goal of creating a 7-1 map, he did acknowledge that the group briefly considered creating a map such that "eight Democratic and zero Republican congressional representatives could be elected" from Maryland. *Id.* ¶ 12.

Governor O'Malley appointed the Governor's Redistricting Advisory Committee as the public face of his mapdrawing efforts. He charged the committee with holding public hearings around the State and recommending two redistricting plans for his consideration — one for the State's 8 congressional districts and

the other for its 47 legislative districts. Joint Stipulations ¶ 18. The Governor selected Jeanne D. Hitchcock — a Democrat with no prior redistricting experience, who was then the Appointments Secretary in the Governor's Office, *see* Hitchcock Dep. 45–46 (ECF No. 177-8) — to chair the Committee, and he appointed four other individuals to be members of the Committee: state Senate President Thomas V. Mike Miller, Jr.; state House of Delegates Speaker Michael E. Busch; Richard Stewart, a businessman who had chaired the Governor's reelection campaign in Prince George's County; and James J. King, a businessman from Anne Arundel County who had previously served in the House of Delegates and who was the Committee's sole Republican. Joint Stipulations ¶¶ 19–20.

The Advisory Committee held 12 public hearings across the State from July through September 2011 and received approximately 350 comments from members of the public. Joint Stipulations ¶ 22. At hearings conducted in western Maryland, residents provided suggestions regarding potential changes to the shape of the Sixth District. Several of these residents testified about various connections between Frederick and Montgomery Counties — including Interstate 270 ("I-270"), a 35-mile highway running between the City of Frederick and southern Montgomery County — and advocated for replacing the part of the Sixth District stretching east into Baltimore and Harford Counties, and perhaps even some or all of Carroll County, with territory from Montgomery County. But none of the speakers contemplated a map that would remove from

the Sixth District much of Frederick County *itself*, which had been included in its entirety in the Sixth District since 1872. *See, e.g.*, Public Hearing Testimony (ECF No. 186-3) at MCM 000029–31 ("[T]he start of the Sixth District is pretty easy, with Garrett, Allegany, Washington, and Frederick, you've got a nucleus there. . . . [O]nce you start with those four counties, . . . your orientation should be to go east into either Howard, or go southeast into Montgomery Counties, to the greatest extent possible, and . . . leave Harford, Baltimore, and even portions of Carroll for a Baltimore-oriented district"); *id.* at MCM000038 ("[B]oth in terms of making it viable for someone to reach the voters, and in terms of better representing the population, it would make more sense to re-orient the district to include more of Montgomery County and less — and none of Harford and Baltimore and less of Carroll, as you put those communities in with the Baltimore County area that they are naturally a part of"); *id.* at MCM 000048 ("Frederick County and the counties west of Frederick have more in common with Montgomery County than they do with Carroll, Baltimore, or Harford").

The Advisory Committee released its proposed congressional redistricting plan to the public on October 4, 2011, with the Committee's lone Republican casting the sole vote against the plan. Joint Stipulations ¶ 32. The Committee's map had a federal DPI of 53% in the Sixth District, which was greeted as "good news" by the man who was widely expected to be the Democratic nominee to represent the newly redrawn District in the upcoming 2012 election. ECF No.

177-25; *see also* Garagiola Dep. 27 (ECF No. 177-24) (agreeing that, in his mind, "one of the purposes[ ] [was] to make the Sixth Congressional District have [a] 53 percent Democratic performance"). As he succinctly explained at the time, the Advisory Committee's proposed Sixth District would include "[a]ll of Washington, Alleg[a]ny, and Garrett [Counties]"; "southern Frederick [County] and the City of Frederick"; and then "about 40% of Montgomery County, including northern and western parts," while "[t]he rest of Frederick would be in [the Eighth] district." ECF No. 177-25.

Members and staff of the Advisory Committee briefed a joint session of the state House and Senate Democratic Caucuses about their recommended congressional plan on October 3, 2011. Joint Stipulations ¶ 35. Talking points prepared for Senate President Miller's introductory remarks encouraged him to emphasize that "[e]ven though the map isn't pretty, it accomplishes a few important goals," including "creat[ing] an opportunity for Montgomery County to control two congressional districts"; "preserv[ing] all six incumbent Democrats in 'safe' districts," none of which would have "less than 58% Democratic performance"; and "giv[ing] Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett." ECF No. 177-23. The talking points continued, "In the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity." *Id.*

Following Senate President Miller's remarks, Chairwoman Jeanne Hitchcock delivered a PowerPoint

presentation that stated that the Sixth and Eighth Districts had been "[c]onfigured to reflect the North-South connections between Montgomery County, the I-270 Corridor, and western portions of the State." Joint Stipulations, Ex. 6. The record suggests that those in attendance were skeptical that the I-270 corridor justified dramatically redrawing both the Sixth and the Eighth Districts. For example, immediately after Hitchcock's presentation, Democratic Delegate Curt Anderson told a reporter, "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." Joint Stipulations ¶ 46. And, while listening to Hitchcock give a similar presentation earlier in the day, one senior congressional aide who had been intimately involved in the redistricting process wrote to another, "This is painful to watch. . . . I'm not sure I buy the themes they are selling. Hopefully they have some better ones for the public face of it." ECF No. 177-58.

On October 15, 2011, Governor O'Malley announced that he was submitting a map to the General Assembly that was substantially the same as the Advisory Committee's proposal, Joint Stipulations ¶ 33, and two days later, on October 17, Senate President Miller introduced the Governor's proposed redistricting map as Senate Bill 1 at a special legislative session. With only minor technical amendments, Senate Bill 1 was signed into law on October 20, 2011, three days after it had been introduced. *Id.* ¶ 34; *see* Md. Code Ann., Elec. Law §§ 8-701 – 8-709. In the 2012 general

election, Maryland voters were asked whether they were "for" or "against" the law that "[e]stablishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution," and 64% of voters who responded to that question voted in favor of the law. Joint Stipulations ¶ 39.

"No Republican Senator or Delegate voted for Senate Bill 1 in committee or on the floor in recorded roll call votes." Joint Stipulations ¶ 36. Moreover, while the legislation was progressing rapidly through the General Assembly, numerous legislators made comments reflecting their clear understanding that the massive redrawing of the Sixth District was designed primarily to give the eventual Democratic nominee a distinct electoral advantage over the Republican nominee. For example, one Delegate bluntly stated in a floor speech that he supported the map because it meant "more Democrats in the House of Representatives." *Id.* ¶ 44. Another Delegate stated in an October 17 interview that, "What we're doing is we are trying to get more, in terms of — currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one, with the additional Congressional district coming more out of Montgomery county and going into western Maryland that would give the Democrats more." *Id.* ¶ 47. One Democratic Senator who voted for the bill nonetheless lamented in a floor speech that partisan gerrymandering was a problem across America, adding that "it's a process where we dress up partisan and political

ambition on both sides of the aisle in high principle, *but we can all tell what's really going on.*" Joint Stipulations ¶ 43(a) (emphasis added). And the only Democratic Senator to vote against the bill stated in an October 14 interview, "[W]hen you look at the way these districts are drawn, they're absolutely drawn with one thing in mind. . . . *[I]t's certainly drawn so that you can minimize the voice of the Republicans.*" ECF No. 177-41 at 16 (emphasis added).

The result of the wholesale recomposition of the Sixth District was precisely as intended and predicted. In October 2012, the Cook Political Report released an analysis of "all 435 newly redrawn Congressional districts in the country" using its Partisan Voter Index ("Cook PVI"), ECF No. 177-52 at 1, a well-respected "measurement of how strongly a United States congressional district or state leans toward the Democratic or Republican Party, compared to the nation as a whole," ECF No. 177-51; *see also* Lichtman Dep. 131 (ECF No. 177-49) (testimony of State's expert witness that the Cook PVI is a "well respected" and "well regarded" metric). Specifically, a Cook PVI of D+2 means that in the last two presidential elections, "that district performed an average of two points more Democratic than the nation did as a whole." ECF No. 177-52 at 9. In addition to calculating PVIs, the Cook Report also assigns each congressional district a label based on its assessment of the political parties' electoral prospects.

Using these metrics, the Cook Report examined "which districts underwent the most dramatic alterations in redistricting" following the 2010 census and

found that Maryland's Sixth District experienced the single largest swing of any district in the Nation. ECF No. 177-52 at 6–8. Specifically, before the 2011 redistricting, the Sixth District had a Cook PVI of "R+13" and a "Solid Republican" label; after redistricting, the District received a Cook PVI of "D+2" and a "Likely Democratic" label. *Id.* at 8. An academic analysis that looked at the accuracy of the Cook Report's forecasting over the course of 11 congressional elections helps unpack the significance of this swing. When the Cook Report has rated a district "Solid Republican" on the eve of a congressional election, the Republican candidate has won the race 99.7% of the time; what is more, when a district has been rated as "Likely Democratic," the Democratic candidate has won 94% of the time. *See* James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 43 Pol. Sci. & Politics 627, 628 (2010) (ECF No. 191-8).

Moreover, the Cook Report's analysis of the effect of redistricting on the Sixth District was consistent with NCEC's own DPI data. According to NCEC, in the 2016 congressional election cycle, "Democrats [nationwide] won only four districts where DPI was below 50 percent"; in none of those districts was the DPI below 40%, as it was in the Sixth District prior to redistricting. ECF No. 191-7 at 1–2. Conversely, among the 160 districts across the country with a DPI above 50%, all but 12 were won by the Democratic candidate. *See id.* Thus, given that the new Sixth District's DPI was 53%, NCEC's data, like Cook's, confirmed that the

Democrats held a clear electoral advantage in the District as a result of its redistricting.

The record demonstrates further that, in addition to the reduced opportunity to elect a candidate of their choice, the plaintiffs and other active members of Maryland's Republican Party faced new difficulties in their organizational efforts as a result of the redistricting. For example, Plaintiff Sharon Strine — a registered Republican voter who had consistently voted for Republican candidates — testified that until the 2011 redistricting plan reassigned her residence to the Eighth District, she had lived and voted in the Sixth District ever since registering to vote on her 18th birthday in the early 1980s. Strine Dep. 9–15 (ECF No. 177-53). Even though she no longer lived in the Sixth District, she nonetheless worked for over a year on Sixth District Republican nominee Dan Bongino's 2014 congressional campaign, eventually serving as the campaign's manager. *Id.* at 8, 59, 61–62. She testified that over the course of the campaign — "between festivals, knocking on doors, parades, anything you can imagine" — she spoke to thousands of people in the Sixth District and that "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time. . . . [T]hey just [felt] disenfranchised that . . . they don't have somebody that represents them anymore . . . [a]fter the redistricting." *Id.* at 61–63.

Similarly, Plaintiff Alonnie L. Ropp — also a registered Republican voter who had consistently voted for Republican candidates and whose residence was

also reassigned to the Eighth District — testified that, at the time of the 2014 congressional election, she served on the Frederick County Republican Central Committee and played a role in "promot[ing] all of our Republican candidates running in our geographic territory." Ropp Dep. 16–23, 33 (ECF No. 177-54). She described how, when she engaged with potential voters in that capacity, she routinely spent a lot of the conversation helping the voter figure out which congressional district the voter lived in, the Sixth or the Eighth. *Id.* at 34–38. As she stated, "[A] large percentage of folks, if they had historically voted, they were confused about the candidates. They didn't know who they should be engaging. It was a very confusing situation for them that year." *Id.* at 37. She added that "we spent most of our time" trying to ascertain the voter's district and that, "by the time [we] [got] through 20 minutes of that conversation," some people "felt as though they didn't want to participate that time because it seemed too confusing." *Id.* at 37–38.

And Plaintiff Edmund Cueman — a longtime resident of Carroll County and registered Republican voter whose residence was reassigned to the Eighth District — described personally feeling "disoriented" by and "disconnected" from his new congressional district: "[M]y feelings were that every time there's a census, yeah, you may have to make some adjustments. You can't freeze it in time but this . . . was a chop job. . . . I have absolutely no connection with what is in this district except the portions of Frederick that were

thrown in." Cueman Dep. 11–16, 36–37 (ECF No. 177-55).

Other record evidence corroborates these plaintiffs' experiences, including evidence showing that Sixth District registered Republican voters' participation declined in primary elections in midterm years — *i.e.*, when congressional candidates topped the federal ticket. For example, in Garrett County, 48% of registered Republican voters participated in the 2010 Republican primary election, but that number fell to 35% in 2014; in Allegany County, there was a 43% turnout for the 2010 Republican primary, a number that fell to 27% in 2014; and in Washington County, the percentage of Republicans participating in the primary fell from 37% in 2010 to 25% in 2014. ECF No. 191-11 at 3, 9–10.

Similarly, the record shows a decline in fundraising by the Republican Central Committees of the three counties that remained entirely within the Sixth District after the 2011 redistricting. Specifically, in the 2014 filing period, the Republican Central Committees for Garrett, Allegany, and Washington Counties received 6.5% less than in the 2010 filing period, the prior midterm election year. ECF No. 210, Ex. C-8 to C-11. Fundraising by these committees during presidential election years has suffered as well — comparing the contributions received in the 2008 filing period with those received in the 2012 filing period reveals a drop of 12%. *Id.*

B

Three Maryland citizens, acting *pro se*, commenced this action in November 2013, naming as defendants the Chair and the Administrator of the State Board of Elections and alleging that the 2011 redistricting plan violated their rights under the First Amendment and Article I, § 2, of the U.S. Constitution. A district court judge granted the State's motion to dismiss, *Benisek v. Mack*, 11 F. Supp. 3d. 516 (D. Md. 2014), and the Fourth Circuit summarily affirmed, 584 F. App'x 140 (4th Cir. 2014). The Supreme Court, however, reversed that judgment in December 2015, concluding that the plaintiffs' constitutional challenge was not "wholly insubstantial" and that therefore it had to be decided by a district court composed of three judges, as required by 28 U.S.C. § 2284. *Shapiro v. McManus*, 136 S. Ct. 450, 455–56 (2015) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). In doing so, the Court observed that the theory underlying the plaintiffs' First Amendment claim had originally been suggested by Justice Kennedy in his concurring opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and was "uncontradicted by the majority in any of [the Court's] cases." *Shapiro*, 136 S. Ct. at 456.

On remand, the plaintiffs, then represented by counsel, promptly filed a second amended complaint in February 2016 — roughly one week after this three-judge court was empaneled. The amended complaint added six additional plaintiffs and refined the theory underlying their constitutional challenge. Two of the original plaintiffs later agreed to their dismissal from

the action, leaving seven plaintiffs, all of whom are registered Republicans who lived in the Sixth District prior to the 2011 redistricting. Three of these plaintiffs still reside in the Sixth District, while four of them now live in the Eighth District as a result of the redistricting.

In an opinion issued August 24, 2016, we denied the State's motion to dismiss, concluding that the plaintiffs had adequately alleged a justiciable claim for relief. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 586, 600 (D. Md. 2016). Drawing on First Amendment retaliation principles, we held that to succeed on their claim, the plaintiffs would have to prove three elements: first, *specific intent* — "that those responsible for the map redrew the lines of [their] district with the specific intent to impose a burden on [them] and similarly situated citizens because of how they voted or the political party with which they were affiliated"; second, *injury* — that the plaintiffs had, in fact, experienced a concrete burden on their legally protected interests; and third, *causation* — "that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." *Id.* at 596–97 (emphasis omitted).

Following the completion of extensive discovery, the plaintiffs filed a motion for a preliminary injunction in May 2017 to prevent the use of the challenged map during the 2018 elections. The plaintiffs' motion alternatively sought summary judgment, and the State subsequently filed a cross-motion for summary judgment. In August 2017, we denied the plaintiffs'

motion for a preliminary injunction and stayed further proceedings — including resolution of the parties' cross-motions for summary judgment — for the Supreme Court's decision in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). *See Benisek v. Lamone*, 266 F. Supp. 3d 799 (D. Md. 2017). The Supreme Court affirmed our denial of the plaintiffs' motion for a preliminary injunction in June 2018, *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–45 (2018), and, on remand, the parties agreed not to reopen discovery. They did, however, file supplemental summary judgment memoranda, and we conducted a lengthy hearing on the parties' cross-motions for summary judgment on October 4, 2018.

II. Legal Principles of the Districting Process

The process of creating districts from which members of the U.S. House of Representatives are elected is rooted in the authority granted by the U.S. Constitution to both state legislatures and Congress — political departments of the respective governments. In establishing the U.S. House of Representatives, the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," U.S. Const. art. I, § 2, cl. 1, and further that "[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof," *id.* § 4, cl. 1. Article I thus "leaves with the States primary responsibility for apportionment of their federal congressional . . . districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993).

While Maryland has enacted no law codifying procedures for discharging the responsibilities conferred on it by Article I, § 4, it has codified procedures for redrawing the lines of state legislative districts following each decennial census. The Maryland Constitution, Article III, § 5, provides:

> Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing the members of the Senate and the House of Delegates.
>
> The Governor shall present the plan to the President of the Senate and the Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly. . . . [The] plan shall conform to Sections 2, 3, and 4 of this Article.

And Section 4, in particular, requires that each legislative district "consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions." *Id.* § 4. The Maryland Constitution provides further that if the General Assembly fails to adopt the Governor's plan, that plan "shall become law." *Id.* § 5. The Maryland General Assembly implemented a state legislative district plan pursuant to these provisions following the 2010 census. *See* Md. Code Ann., State Gov. § 2-201 *et seq.*

With no law codifying the congressional redistricting procedure, Maryland has, by custom, substantially

followed the procedure set forth in the Maryland Constitution for adopting state legislative districts. Thus, following each decennial census, the Maryland Governor takes charge of congressional redistricting by holding advisory hearings and creating a redistricting plan, which he then submits to the General Assembly as a joint resolution for adoption. And that process was followed after the 2010 census. The process, however, did not incorporate the restrictions contained in the Maryland Constitution, Article III, § 4, that provide for contiguity, compactness, regard for natural boundaries, and regard for boundaries of political subdivisions.

While Article I of the U.S. Constitution gives the States primary responsibility for the apportionment of federal congressional districts, it also reserves to Congress the power to override decisions made by the States. Article I, § 4, provides that "the Congress may at any time by Law make or alter such [state] Regulations" pertaining to the election of federal representatives. U.S. Const., art. I, § 4, cl. 1. And over the years Congress has exercised that authority in various ways. In 1842, it required that members of the House of Representatives be elected from single-member districts composed of contiguous territory. Apportionment Act of 1842, ch. 47, 5 Stat. 491. In 1872, it required further that districts contain, "as nearly as practicable[,] an equal number of inhabitants." Apportionment Act of 1872, ch. 11, § 2, 17 Stat. 28. In 1901, it added a compactness requirement. Apportionment Act of 1901, ch. 93, § 3, 31 Stat. 733, 734. In 1911, it again imposed

requirements of contiguity, compactness, and equality of population. Apportionment Act of 1911, ch. 5, § 3, 37 Stat. 13, 14. But as it stands today, Congress only requires that the States create single-member districts. *See* 2 U.S.C. § 2c. The single-member-district requirement "produce[s] a different . . . result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Thus, while the single-member-district requirement effects a more democratic result, it is this requirement that gives rise to apportionment disputes and gerrymandering.

As the Supreme Court has observed, "[i]t is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area." *Gaffney*, 412 U.S. at 753. And those state officials charged with redistricting will of course "recognize the political consequences of drawing a district line along one street rather than another." *Id.* The practical "reality is that districting inevitably has and is intended to have substantial political consequences." *Id.*; *see also Vieth*, 541 U.S. at 285 (plurality opinion) ("The Constitution clearly contemplates districting by political entities, *see* Art. I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics"). Thus, because the Constitution commits district apportionment to political departments, it is quintessentially a political process, and courts cannot invalidate a redistricting map merely because its drafters took political

considerations into account in some manner. *See Gaffney*, 412 U.S. at 752–53.

Nonetheless, when political considerations are taken into account to an extreme, the public perceives an abuse of the democratic process without fully understanding how it can be resolved within the existing structure. Indeed, partisan gerrymandering, as it is called, is widely considered to be repugnant to representative democracy. As stated earlier in this case:

> The widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy. Indeed, both Democrats and Republicans have decried it when wielded by their opponents but nonetheless continue to gerrymander in their own self interest when given the opportunity. The problem is cancerous, undermining the fundamental tenets of our form of democracy.

Benisek v. Lamone, 266 F. Supp. 3d at 818 (Niemeyer, J., dissenting); *see also Shapiro*, 203 F. Supp. 3d at 600 (Bredar, J., dissenting) (noting that gerrymandering is a "noxious" practice with "no place in a representative democracy"). Moreover, the Supreme Court, with no disagreement from any Justice, has concluded repeatedly that severe partisan gerrymandering is incompatible with democratic principles, *see, e.g.*, *Vieth*, 541 U.S. at 292 (plurality opinion), as it threatens "the core principle of republican government" — "that the voters should choose their representatives, not the other way around," *Ariz. State Legislature v. Ariz.*

Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks and citation omitted).

Consistent with these concerns, in an earlier case addressing alleged racial discrimination with respect to the same 2011 redistricting plan, we noted that the shape of Maryland's Third Congressional District resembled a "broken-winged pterodactyl lying prostrate across the center of the State." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 902 n.5 (D. Md. 2011) (Niemeyer, J.). And, to be sure, that pterodactyl still lies there, broken-winged. Yet, any effort to address misshapen districts simply based on shape would likely stray beyond the province of the courts. We thus begin with the recognition that reviewing the political activity giving rise to the 2011 redistricting law ordinarily is not a role conferred on the courts.

But, even as we recognize that the districting process is largely political in nature, we also understand that state officials are always limited by specific provisions of the U.S. Constitution. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990) ("To the victor belong only those spoils that may be *constitutionally* obtained" (emphasis added)). And when state officials violate specific provisions of the Constitution in carrying out their districting responsibilities, courts must not hesitate to fulfill their constitutionally assigned role. As the Supreme Court has stated, the political nature of redistricting does not "immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the

constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*. . . . The right to vote is too important in our free society to be stripped of judicial protection. . . ." *Wesberry v. Sanders*, 376 U.S. 1, 6–7 (1964) (citations omitted).

In this vein, the Supreme Court has over the years applied specific constitutional provisions to regulate particular apportionment plans. In *Baker v. Carr*, 369 U.S. 186 (1962), the Court held justiciable a claim alleging that a state legislative map establishing districts with unequal populations violated the Equal Protection Clause. Similarly, in *Wesberry*, the Court held that Article I, § 2's provision for the election of representatives "by the People" meant that "one man's vote in a congressional election is to be worth as much as another's," 376 U.S. at 7–8, so that today congressional districts must be drawn "with populations as close to perfect equality as possible," *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

The Court has also held that racial discrimination in the districting process violates the Equal Protection Clause, *see Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993), and has approved remedial redistricting in cases of racial gerrymandering, *see, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) (per curiam).

And in *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court recognized that diluting the votes of one political party's members in the districting process could

violate the Equal Protection Clause. But establishing a standard under the Equal Protection Clause to give effect to *Bandemer*'s conclusion has proven elusive for the Court. *See Gill*, 138 S. Ct. at 1926–29 (describing the Court's efforts over the years in *Gaffney, Bandemer, Vieth*, and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), to articulate a standard). Nonetheless, when a districting plan, even though the product of a political process, is alleged to have injured those before the court in violation of a specific provision of the Constitution, the court must exercise its role by applying the standards attending the constitutional right at issue.

In this case, we have concluded that the plaintiffs' claims state a viable cause of action in alleging that Maryland's 2011 redistricting plan violated the First Amendment by burdening their representational and associational rights based on their party affiliation and voting history. *See Shapiro*, 203 F. Supp. 3d 579. To be sure, the Supreme Court has not directly addressed allegations that a redistricting plan has violated the First Amendment, but it has indicated clearly that such a challenge is not precluded by its decisions or by the Constitution. *See Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment) ("If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State show[ed] some compelling interest"); *id.* ("The First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection

Clause. . . . The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association"); *Shapiro*, 136 S. Ct. at 456 (noting that the plaintiffs' legal theory in this case — which is premised on the First Amendment rather than the Equal Protection Clause — is "uncontradicted by the majority in any of [the Court's] cases"); *see also Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (recognizing that "partisan gerrymanders may infringe the First Amendment rights of association held by parties, political organization, and their members"). As Justice Kennedy explained, "After all, . . . allegations [of unconstitutional partisan gerrymandering] involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment). Relying on decisions such as *Elrod v. Burns*, 427 U.S. 347 (1976), and *California Democratic Party v. Jones*, 530 U.S. 567 (2000), he stated:

> As these precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect

> of burdening a group of voters' representational rights.

541 U.S. at 314. The plaintiffs in this case make these very allegations, contending that the partisan gerrymander effected by Maryland's 2011 congressional redistricting plan injured both their representational rights and their associational rights by reason of their political views, in violation of the First Amendment.

III. Representational Rights

It is fundamental that "the Constitution of the United States protects the right of all qualified citizens to vote," *Reynolds v. Sims*, 377 U.S. 533, 554 (1964), and that a citizen's right to vote is "individual and personal in nature," *id.* at 561. Indeed, "the right of qualified voters, *regardless of their political persuasion*, to cast their votes effectively . . . rank[s] among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (emphasis added). Expounding on the significance of this representational right, the Supreme Court has explained:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in th[is] political process[ ]. . . . Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. *Full and effective participation by all citizens . . . requires, therefore, that*

> *each citizen have an equally effective voice in the election of [a representative].*

Reynolds, 377 U.S. at 565 (emphasis added).

Based on these foundational principles, the Supreme Court has long recognized that the Constitution prohibits States from drawing legislative districts with unequal populations — for "[i]f districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts." *Bd. of Estimate of N.Y.C. v. Morris*, 489 U.S. 688, 693–94 (1989). Indeed, when a State discharges its constitutionally conferred duty to create congressional districts, it must draw "districts with populations as close to perfect equality as possible." *Evenwel*, 136 S. Ct. at 1124.

While a State can thus literally contract the value of a citizen's vote by placing the citizen in an overpopulated district, it can similarly contract the value of a citizen's vote by placing the citizen in a district where the citizen's political party makes up a smaller share of the electorate, thereby reducing the citizen's chance to help elect a candidate of choice. *Cf. Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government").

To be sure, citizens have no constitutional right to be assigned to a district that is likely to elect a

representative that shares their views. But they do have a right under the First Amendment not to have the value of their vote diminished *because of* the political views they have expressed through their party affiliation and voting history. Put simply, partisan vote dilution, when intentionally imposed, involves the State penalizing voters for expressing a viewpoint while, at the same time, rewarding voters for expressing the opposite viewpoint. This targeting of a citizen's viewpoint is typical of First Amendment violations in other contexts. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant"); *Bd. of Educ. v. Pico*, 457 U.S. 853, 870–71 (1982) ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books"). As the Supreme Court has explained, "[E]ven though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely," chief among them, a person's political viewpoint, as expressed in his party affiliation and voting history. *Rutan*, 497 U.S. at 72 (internal quotation marks and citation omitted).

Applying traditional First Amendment jurisprudence to government action in redistricting, we previously held in this case that a plaintiff states a claim

under the First Amendment when he demonstrates (1) that "those responsible for [a redistricting] map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated," (2) that "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect," and (3) that "the mapmakers' intent to burden a particular group of voters by reason of their views" was a but-for cause of the "adverse impact." *Shapiro*, 203 F. Supp. 3d at 596–97. When the plaintiff makes a sufficient showing of these requirements, "the State can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest." *Id.* at 597.

Before turning to address the merits, however, we address the threshold argument raised by the State that the "[p]laintiffs here have failed to produce evidence sufficient to establish that they suffered legally cognizable individual harm," as necessary to satisfy the injury-in-fact component of Article III standing.

A

Consistent with Article III of the Constitution, which limits the jurisdiction of federal courts to "Cases" and "Controversies," courts must "exercise power that is judicial in nature," rather than "serv[ing] as a forum for generalized grievances." *Lance v. Coffman*, 549 U.S. 437, 439, 441 (2007). As such, "a plaintiff may not

invoke federal-court jurisdiction unless he can show 'a personal stake in the outcome of the controversy,'" *Gill*, 138 S. Ct. at 1929 (quoting *Baker*, 369 U.S. at 204), which he does by "satisfy[ing] the familiar three-part test for Article III standing: that he '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision,'" *id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). "Foremost among these requirements is injury in fact — a plaintiff's pleading and proof that he has suffered the 'invasion of a legally protected interest' that is 'concrete and particularized,' *i.e.*, which 'affect[s] the plaintiff in a personal and individual way.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992)). The "irreducible constitutional minimum of standing" is "not [a] mere pleading requirement[] but rather an indispensable part of the plaintiff's case," which "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . at the successive stages of the litigation." *Lujan*, 504 U.S. at 560–61.

The Supreme Court applied these principles specifically to the context of a partisan gerrymandering claim premised on vote dilution in *Gill v. Whitford*. In *Gill*, a group of Democratic voters from Wisconsin filed a complaint challenging the 2011 redistricting plan for that State's legislature, alleging that the plan constituted an unconstitutional partisan gerrymander that "unfairly favor[ed] Republican voters and candidates" by "cracking" and "packing" Democratic voters

throughout the State. 138 S. Ct. at 1923–24 (internal quotation marks omitted). Several of the *Gill* plaintiffs alleged that they lived in districts where Democrats had been cracked or packed, and all of them alleged that, regardless of whether they personally lived in such a district, they had been harmed because the manipulation of district boundaries across the State affected the legislature's overall composition. *Id.* at 1924. The case proceeded to trial, where the plaintiffs focused on their theory of *statewide* injury rather than offering proof that any of their particular districts had been cracked or packed. *Id.* at 1932.

On appeal, the Supreme Court vacated the district court's judgment in favor of the plaintiffs and remanded for further proceedings, holding that the plaintiffs had failed to show "standing under the theory upon which they based their claims for relief." *Gill*, 138 S. Ct. at 1929. The Court explained that because "a person's right to vote is 'individual and personal in nature,'" *id.* (quoting *Reynolds*, 377 U.S. at 561), "'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage," *id.* (quoting *Baker*, 369 U.S. at 206). The *Gill* plaintiffs did allege "that they suffered such injury from partisan gerrymandering, which works through 'packing' and 'cracking' voters of one party to disadvantage those voters." *Id.* at 1930. But the Court explained, "[t]o the extent the plaintiffs' alleged harm [was] the dilution of their votes, *that injury [was] district specific*" because the voter "votes for a single representative." *Id.* (emphasis added). As a

result, it is "the boundaries of the particular district in which [a voter] resides" — "and the composition of its voters" — that determine whether and to what extent that voter has been "'disadvantage[d] . . . as an individual.'" *Id.* (brackets omitted) (quoting *Baker*, 369 U.S. at 206). The Court noted that the remedy for such partisan gerrymandering "lies in the revision of the boundaries of the individual's own district." *Id.* In sum, the voter alleging a dilution violation *in his district* has standing to sue for that violation.

But the Court rejected the plaintiffs' theory of a "*statewide harm* to their interest 'in their collective representation in the legislature,'" reasoning that "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative" and that "the harm asserted by the plaintiffs is best understood as arising from a burden on those plaintiffs' own votes," which in turn "arises through a voter's placement in a 'cracked' or 'packed' district." *Gill*, 138 S. Ct. at 1931 (emphasis added). Because the plaintiffs did not seek to show the requisite harm "that he or she live[d] in a cracked or packed district" but proceeded "on their theory of statewide injury," the Court concluded that the plaintiffs had failed to demonstrate Article III standing. *Id.* at 1932. But "in light of the plaintiffs' allegations that [certain of them] live[d] in districts where Democrats like them have been packed or cracked," the Court "decline[d] to direct dismissal" and instead "remand[ed] the case to the District Court so that the plaintiffs [might] have an opportunity to prove concrete and particularized injuries

using evidence . . . that would tend to demonstrate a burden on their individual votes." *Id.* at 1934.

The plaintiffs in this case, unlike the plaintiffs in *Gill*, have brought and pursued the kind of single-district challenge that *Gill* recognized as providing such plaintiffs with standing. Here, all seven plaintiffs are registered Republicans who lived in Maryland's Sixth District prior to the 2011 redistricting plan. Three still live in the Sixth District, while the other four were moved to the neighboring Eighth District. And ever since the filing of their Second Amended Complaint, their theory of the case has been that those responsible for the redistricting plan intentionally and successfully "cracked" the formerly Republican Sixth District by removing many of the precincts that had historically supported Republican candidates and replacing them with overwhelmingly Democratic precincts.

After *Gill*, it is clear that if the plaintiffs show, as they have alleged, that the State deliberately acted to flip the former Sixth District from one very likely to elect the Republican candidate for Congress to one quite likely to elect the Democrat, they will have established that the State made it materially harder for them to play a role in electing a candidate of choice. They would, in short, establish a "disadvantage to themselves" in their capacity as individual voters and their "'standing to sue' to remedy that disadvantage." *Gill*, 138 S. Ct. at 1929 (quoting *Baker*, 369 U.S. at 206).

B

Turning to the merits, we conclude, based on the summary judgment record, that the plaintiffs have sufficiently established each element of their First Amendment claim that their representational rights have been impermissibly burdened by reason of their political views and voting history. Relying on undisputed facts, the plaintiffs have shown that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

First, with respect to the mapmakers' intent, the process described in the record admits of no doubt. Maryland Democratic officials worked to establish Maryland's congressional district boundaries in 2011 with a narrow focus on diluting the votes of Republicans in the Sixth Congressional District in an attempt to ensure the election of an additional Democratic representative in the State's congressional delegation. Governor O'Malley, who was responsible for the redistricting process, asked Congressman Hoyer to lead the redistricting effort, and Hoyer retained NCEC to draw up district maps that (1) protected Democratic incumbents and (2) flipped the Sixth District from Republican to Democratic control. Hawkins, an NCEC analyst, followed those two commands and prepared district maps using NCEC's proprietary DPI metric to assess the likelihood that a district would elect a Democratic candidate. He homed in on maps where the data predicted a Democratic victory in the Sixth District, unlike maps submitted by third parties, which had sub-50% DPI values for the Sixth District. Hawkins

submitted maps to the Democratic members of Maryland's congressional delegation, at least one of which the delegation passed on to Maryland Democratic officials who were members of the Governor's Redistricting Advisory Committee. Moreover, the underlying precinct-level DPI data were shared with the officials' staffers, who then used that information, along with State data on party registration and voter turnout, to develop a final map with a 53% DPI for the Sixth District, which the Governor submitted to the General Assembly and the General Assembly promptly adopted. Reliance on the DPI in finalizing a map was essential to achieving the specific intent to flip the Sixth District from safely Republican to likely Democratic.

Moreover, the record is replete with direct evidence of this precise purpose. For example, notes prepared for state Senate President Miller's remarks to the state House and Senate Democratic Caucuses about the redistricting plan emphasized that the map "create[d] an opportunity for Montgomery County to control two congressional districts"; "preserve[d] all six incumbent Democrats in 'safe' districts," none of which would have "less than 58% [DPI]"; and "g[ave] Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett." ECF No. 177–23. Governor O'Malley admitted that he intended to "create a district where the people would be more likely to elect a Democrat than a Republican." O'Malley Dep. 82; *see also id.* at 27–28 (describing aim of "put[ting] more Democrats and Independents into the Sixth District" to help ensure "the election of another

Democrat"). Senate Majority Leader Garagiola admitted that "one of the purposes[ ] [was] to make the Sixth Congressional District have 53 percent Democratic performance." Garagiola Dep. 16, 27. These sorts of statements, particularly by delegates and state senators during the General Assembly's abbreviated consideration of the proposed map, are legion. *See, e.g.*, Joint Stipulations ¶¶ 40–51.

The State's argument that its officials intended only "to allow Democrats to have an equally effective voice in the election of a representative" in the Sixth District — an intent that it argues "cannot be equated with an intent to burden [Republicans'] representational rights" — rings hollow. Even if the intent to make one party "more competitive" were constitutionally permissible, the record shows something materially different. Democratic officials, with the help of NCEC, worked to craft a map that would specifically transform the Sixth District into one that would *predictably* elect a Democrat by removing Republicans from the District and adding Democrats in their place.

Moreover, the State's argument fails to appreciate the requirements of the law. If the government uses partisan registration and voting data purposefully to draw a district that disfavors one party, it cannot escape liability by recharacterizing its actions as intended to favor the other party. The First Amendment does not — indeed, cannot — distinguish between these intents because they are one and the same when applicable to two-party elections. It is impossible to flip a seat to the Democrats without flipping it away from

the Republicans. Thus, when the government targets a class of persons based on the persons' political affiliation and voting and then acts so as to burden their representational rights, it has run afoul of the First Amendment, no matter how it characterizes its intent.

The State also argues that its officials did not act with impermissible intent because they did not target *specific* voters based on their individual party affiliation or voting history. This argument, too, is based on a misunderstanding of First Amendment jurisprudence. Here, the plaintiffs have shown that they were targeted for disfavored treatment because of a shared marker of political belief — their Republican Party affiliation. The fact that the State intentionally moved Republican voters out of the Sixth District en masse, based on precinct-level data, and did not examine each individual voter's history does not make its action permissible under the First Amendment. *Cf. Miller*, 515 U.S. at 920 (condemning State's *targeting of areas* with "dense majority-black populations" for inclusion in district).

At bottom, given the overwhelming direct and circumstantial evidence, there can be no doubt that at every stage of the process, the State's Democratic officials who put the 2011 redistricting plan in place specifically intended to flip control of the Sixth District from Republicans to Democrats and then acted on that intent. The plaintiffs have amply established the intent element of their claim.

Second, with respect to the injury element, the plaintiffs have shown that the redrawn Sixth District did, in fact, meaningfully burden their representational rights. At the threshold, it is important to reiterate that, under the standard set forth in our denial of the State's motion to dismiss, a plaintiff who has shown that the State acted with impermissible retaliatory intent need not show that the linedrawing altered the outcome of an election — though such a showing would certainly be relevant evidence of the extent of the injury. *See Shapiro*, 203 F. Supp. 3d at 598. And, contrary to the State's argument, the plaintiffs need not show that the new Sixth District was *certain* to produce a Democratic congressman to establish injury to their rights as voters. Indeed, it would only be a "perfect" gerrymander where "a voter [who] lives in a cracked district" stands "*no* chance" of having her preferred candidate prevail. *Gill*, 138 S. Ct. at 1936 (Kagan, J., concurring) (emphasis added). Rather, *the plaintiffs must show only that their electoral effectiveness — i.e., their opportunity to elect a candidate of choice — was meaningfully burdened*, and, of course, that this burden was intentionally imposed for partisan reasons. That is, the plaintiffs must have experienced a "demonstrable and concrete adverse effect" on their "right to have 'an equally effective voice in the election' of a representative,'" which they can establish by showing that they have been placed at a concrete electoral disadvantage. *Shapiro*, 203 F. Supp. 3d at 598 (quoting *Reynolds*, 377 U.S. at 565).

The plaintiffs here have made that showing. By several measures, the dramatic redrawing of the Sixth District's boundaries disfavored Republican voters. In creating the map, the State, on net, removed roughly 66,000 registered Republicans from the Sixth District and added some 24,000 registered Democrats, such that Republican voters went from outnumbering Democrats 1.3 to 1 (47% of the District's registered eligible voters being Republicans and 36% Democrats) to nearly the exact inverse (44% Democrats, 33% Republicans). Joint Stipulations ¶¶ 10, 53. According to the DPI metric used by the mapmakers themselves, as well as the Cook PVI metric endorsed by the State's expert, Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting, and, in *absolute* terms, they had no real chance of doing so. Indeed, the Cook report deemed the district's swing — from R+13 and "Solid Republican" to D+2 and "Likely Democratic" — the largest of any district in the country. ECF No. 177-52 at 6–8. And, historically, "Likely Democratic" districts elect a Democrat 94% of the time. *See* Campbell, *supra*, at 628.

Moreover, while the State's linedrawing need not have changed the outcome of an election to be culpable, the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting provides additional evidence that the Republican voters have suffered a cognizable injury. In other words, the Democratic officials who drew the map achieved

exactly what they aimed to do — to make Republican voters in the Sixth District less effective.

Finally, as to causation, the plaintiffs have established that, without the State's retaliatory intent, the Sixth District's boundaries would not have been drawn to dilute the electoral power of Republican voters nearly to the same extent.

The 2010 census required shifting only a small number of residents — 10,186 — from a district consisting of over 720,000 residents. While adjustments to other districts to achieve equal population or other legitimate goals might also have resulted in some additional adjustments to the Sixth District, the record shows no legitimate basis for the wholesale removal of 360,000 residents in the northern, more Republican portion of the Sixth District and their replacement with 350,000 residents from Montgomery County, a heavily Democratic area. To the contrary, the record conclusively shows that an illegitimate basis — the intent to flip party control — dictated the decision to so radically reshape the Sixth District.

All of these facts were consistent with the actual intent expressed by those responsible for the 2011 redistricting plan. Thus, the causal link between the State's intent and the harm to the targeted voters' representational rights could not be clearer. In short, the record refutes the conclusion that the actions were taken for any other reason than to carry out the specific intent expressed.

The State suggests that other causes were involved, but it fails to explain how the other causes gave rise to the massive shifts of population and the specific targeting of Republicans. It notes, for example, that the need to prevent the new First District from crossing the Chesapeake Bay gave rise to extending the First District around the northern part of the State, effectively requiring that the eastern boundary of the Sixth District be moved westward. Even accepting this suggestion — and, indeed, other similar adjustments to accommodate precise populations and other legitimate redistricting goals — none explains the dramatic exchange of populations between the Sixth and Eighth Districts. Moreover, the State's suggestions do not explain the undisputed fact that virtually all the Democratic officials involved stated that the redistricting operation was guided by the expressed plan to protect existing Democratic seats and flip the Sixth District from Republican to Democratic control.

The State separately suggests that there was an expressed interest in grouping residents along the Interstate 270 corridor in one district. As for this argument, however, there is no evidence that the presence of an interstate highway running from the City of Frederick to southern Montgomery County was the reason for the reconfiguration of both the Sixth and Eighth Districts, as distinct from a post-hoc rationalization. In fact, there is affirmative evidence that the I-270 corridor was *not* a reason for the reconfigurations, including both the utter implausibility of the rationale and statements from key decisionmakers.

In short, while there may have been other causes that could have marginally altered the Sixth District, the striking actions complained of are not explained by the State's proffers.

Moreover, for these same reasons, the State has certainly not shown that its redistricting law was narrowly tailored to achieve a compelling government interest.

In sum, the record amply demonstrates that the State violated the First Amendment under the standard we previously set forth in this case; indeed, there is no way, based on this record, that we could conclude otherwise.

IV. Associational Rights

It is likewise well settled that the First Amendment protects the independent right to associate. *See NAACP v. Button*, 371 U.S. 415, 430 (1963) (noting that the First Amendment protects "the right 'to engage in association for the advancement of beliefs and ideas'" (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958))); *id.* at 431 ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment. . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations" (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion))); *Patterson*, 357 U.S. at 460–61 (noting that "[e]ffective advocacy of both public

and private points of view, particularly controversial ones, is undeniably enhanced by group association"). And this right of association specifically includes the right to associate with political parties. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (noting that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views" and that the "First Amendment protects 'the freedom to join together in furtherance of common political beliefs'" (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986))). The Court has explained the importance of this right to associate with political parties, noting that "political belief and association constitute the core of those activities protected by the First Amendment." *Elrod*, 427 U.S. at 356; *see also Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (explaining that, while restriction on primary voting did not "deprive [voters] of all opportunities to associate with the political party of their choice," it was nonetheless "a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association"). And the kinds of injury resulting from such associational violations are readily discernable and significant: "Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983).

It is therefore unremarkable that Supreme Court Justices have repeatedly recognized these principles in the context of partisan gerrymandering. Explaining that the First Amendment may be "more relevant" than the Equal Protection Clause for assessing partisan gerrymandering, Justice Kennedy reasoned that the First Amendment protects the interest "of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, *their association with a political party*, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (emphasis added). And focusing on political association in particular, Justice Kagan likewise observed only recently that plaintiffs can prove injury in the form of associational harm, as "distinct from vote dilution," by showing that the State has "burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects." *Gill*, 138 S. Ct. at 1938–39 (Kagan, J., concurring). As she explained:

> [T]he associational harm of a partisan gerrymander is distinct from vote dilution. Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party. . . . Members of the

> "disfavored party" in the State, . . . deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives). *See Anderson v. Celebrezze*, 460 U.S. 780, 791–792, and n. 12 (1983) (concluding that similar harms inflicted by a state election law amounted to a "burden imposed on . . . associational rights"). . . . By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.

Id. at 1938 (citation omitted).

Accordingly, plaintiffs can prove a First Amendment partisan gerrymandering claim involving associational harm by demonstrating the elements of such a claim involving representational rights, but in lieu of the harm involving a burden on representational rights, they must prove a harm involving a burden on their associational rights. Thus, they must prove (1) intent, as described in Part III, *supra*; (2) that the challenged map burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims; and (3) causation, again as described in Part III, *supra*.

Before turning to address the merits of the plaintiffs' claim premised on associational harm, however, we again address in this context the State's threshold argument that the plaintiffs have "failed to produce

evidence sufficient to establish that they suffered legally cognizable individual harm," as necessary to satisfy the injury-in-fact component of Article III standing.

A

The State's argument that the plaintiffs lack standing to bring a partisan gerrymandering claim premised on harm to their associational rights under the First Amendment is governed by the same principles applicable to the plaintiffs' claim for injury to their representational rights. *See* Part III.A, *supra*. Only the nature of the injury is distinct. While vote dilution diminishes the targeted voters' opportunity to elect a candidate of their choice, the associational injury is the burden imposed on the targeted party members' ability to affiliate with their political party to carry out its activities and achieve its aims. As Justice Kagan explained in *Gill*, "if the gerrymander ravaged the party [the plaintiff] works to support, then he indeed suffers harm, as do all other involved members of that party." 138 S. Ct. at 1938 (Kagan, J., concurring).

In this case, the plaintiffs claim that by moving, on net, 66,000 Republican voters — over 30% of the Republican voters — from the Sixth District and replacing them with a net of 24,000 Democratic voters, the Republican Party in the Sixth District was indeed "ravaged." As they showed and as described in more detail below, interest among potential Republican voters in the Sixth District declined, fundraising diminished,

and enthusiasm among members of the Republican Party was damaged. And certain of the plaintiffs specifically described facing this type of waning interest. We conclude that the plaintiffs, as the ones claiming to have personally suffered associational injury by reason of the 2011 redistricting, have standing to challenge its constitutionality.

B

Turning to the merits, we conclude, based on the summary judgment record, that the plaintiffs have sufficiently established their First Amendment partisan gerrymandering claim as premised on harm to their associational rights. The plaintiffs, relying on undisputed facts of record, again have shown that they are entitled to judgment as a matter of law.

First, as explained in Part III.B, *supra*, which is also applicable here, in redrawing the lines of the Sixth District, the State acted with constitutionally impermissible intent to disadvantage certain citizens based on their party affiliation and voting history.

Second, with respect to the injury element, the plaintiffs have shown that the 2011 redistricting plan did indeed burden their associational rights. Before the 2011 redistricting, the Sixth District was safely Republican. The Republican congressional representative in the District had been elected to represent the District since 1993, and he won reelection in 2010 by a margin of 28%. But to break that hold by the Republican Party, State officials moved over 30% of registered

Republican voters from the District based on their voting history and replaced them with Democratic voters. The plaintiffs have shown that thereafter voter engagement in support of the Republican Party dropped significantly.

Specifically, they demonstrated that, in midterm election years, Republican participation in Republican primaries in the counties that remained entirely in the Sixth District fell significantly. In Allegany County, for example, Republican voter participation went from 42.8% in the 2010 primary to 26.7% in the 2014 primary. ECF No. 191-11 at 3, 9–10. And for all counties that remained entirely in the District, Republican voter turnout in the primaries declined by roughly 30% from 2010 to 2014. The plaintiffs provided comparable statistics for other elections.

Further, testimony provided by several of the plaintiffs revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters — clear evidence that the plaintiffs were burdened in their ability to "band together in promoting among the electorate candidates who espouse their political views." *Cal. Democratic Party*, 530 U.S. at 574. Plaintiff Strine described how, after the redistricting, "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time." Strine Dep. 61. As she put it, "[T]hey just [felt] disenfranchised that . . . they don't have somebody that represents them anymore." *Id.* at 63. Similarly, Plaintiff Ropp described how, while promoting

Republican candidates, she frequently met potential Republican voters who "didn't want to participate that time because it seemed too confusing." Ropp Dep. 37–38. And Plaintiff Cueman described personally feeling "disoriented" by and "disconnected" from his new congressional district in that he had "absolutely no connection with what is in [the] district except the portions of Frederick that were thrown in." Cueman Dep. 36–37.

The plaintiffs also demonstrated that fundraising by the Republican Central Committees of the counties that remained entirely within the Sixth District after the 2011 redistricting dropped off after the redistricting in both midterm and presidential elections.

We conclude that this undisputed evidence amply demonstrates that the plaintiffs' associational rights were burdened. Members of the Republican Party in the Sixth District, "deprived of their natural political strength by a partisan gerrymander," were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (citing *Anderson*, 460 U.S. at 791–92 & n.12).

Third, as to causation, the same evidence we cited in Part III.B, *supra*, also supports causation here. The massive and unnecessary reshuffling of the Sixth District, involving one-half of its population and dictated by party affiliation and voting history, had no other cause than the intended actions of the controlling

Democratic officials to burden Republican voters by converting the District into a Democratic district. And it was this reshuffling that caused the associational harms noted.

In short, the record amply demonstrates that the State burdened the plaintiffs' associational rights, which, when coupled with the plaintiffs' successful showing of causation and constitutionally impermissible intent, establishes that the State violated the First Amendment. Indeed, based on this record, it is hard to conclude otherwise.

V. Remedy

While the plaintiffs thus prevail on the merits, to obtain a permanent injunction, they must also establish (1) that they will suffer irreparable harm absent the injunction; (2) that remedies available at law, such as monetary damages, are inadequate; (3) that the balance of equities tips in their favor; and (4) that such an injunction would serve the public interest. *See eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 31–33 (2008).

We conclude that in this case, absent an injunction, the plaintiffs will suffer irreparable harm that cannot be remedied at law. Because the State's enactment of the 2011 redistricting law violated the plaintiffs' First Amendment rights, it is well recognized that the plaintiffs are, and will be, experiencing ongoing constitutional injury in the absence of a new

redistricting map. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury"). And only an injunction mandating a new, lawful map, not money damages, can remedy this injury.

While the State does not really challenge these conclusions, it argues that the plaintiffs' interest in redress is weakened by the fact that any new map will only be in place for the 2020 election cycle. This argument presupposes that because there are five congressional elections after each decennial census, one unconstitutional election somehow lacks sufficient importance to justify a remedy. Unfortunately, this argument overlooks the fact that plaintiffs have ongoing associational injury and will suffer additional representational injury during both the 2020 primary election and the 2020 general election if the injunction is not entered. These are injuries resulting from a serious constitutional violation and do not deserve to be demeaned by an approach that tells the plaintiffs essentially "to bear it because it will be over soon" — "soon" meaning in two years. Every election employing constitutionally deficient districts causes irreparable harm. "[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law." *League of Women Voters of N.C.*, 769 F.3d at 247.

With respect to the balance of the equities, the State relies on the Supreme Court's explanation for

affirming the denial of preliminary injunctive relief in this case based on the plaintiffs' delay in seeking that relief to argue that the balance tips in the State's favor with respect to now granting *vel non* a permanent injunction. *See Benisek*, 138 S. Ct. at 1944. But the difference between the plaintiffs' request for a preliminary injunction and their efforts to obtain a permanent injunction cannot be so quickly overlooked. The plaintiffs asked for a preliminary injunction, which operates only *pendente lite*, some three and a half years after this action was commenced, and the Supreme Court concluded that such delay was significant with respect to the interim relief being sought. But a permanent injunction, which we are now addressing, is the ultimate remedy that was sought in this action, and it was requested when the litigation was first commenced in 2013. While it is true that the case has dragged on, that protraction cannot be attributed to the plaintiffs, but to process. This case traveled to the Supreme Court twice and came back to us twice, and we have not seen any dilatory efforts during the process that was before us — either by the plaintiffs or by the State.

Finally, we conclude that a permanent injunction in this case will serve the public interest. It will redress a serious, ongoing constitutional injury and enable a large number of Maryland voters to more fully participate in congressional elections. While the State argues that a permanent injunction will be unduly disruptive, we note our judgment is being issued two years before the next general election — a time period that will

allow the State to comply in an orderly fashion. The relief sought in this case is discrete and limited, seeking only to remedy the redrawing of the Sixth District's lines in a manner that renders them constitutional. Indeed, the plaintiffs have proposed a map that would require modifying only the border between the Sixth and Eighth Districts. We are confident that the State, if it acts diligently, will have little trouble devising an alternative map in time for the 2020 election. Finally, we believe that redrawing district lines to comply with the Constitution will not sow any additional confusion beyond that caused by the illegal lines themselves.

Accordingly, we will enter an injunction (1) permanently enjoining the State from conducting any further elections for members of the U.S. House of Representatives under the 2011 congressional redistricting plan and (2) directing the State to adopt promptly a new congressional districting plan that addresses the constitutional violations found here with respect to the Sixth District for use in the 2020 elections.

BREDAR, Chief District Judge, concurring in the judgment:

Partisan gerrymandering is noxious, a cancer on our democracy. *See Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) (concluding that severe partisan gerrymanders are incompatible with democratic principles); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (stating

that to curb partisan gerrymandering is to restore "the core principle of republican government" that "voters should choose their representatives, not the other way around") (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 Texas L. Rev. 781, 781 (2005)); *Gill v. Whitford*, 138 S. Ct. 1916, 1940–41 (2018) (Kagan, J., concurring) ("At its most extreme, [partisan gerrymandering] amounts to 'rigging elections.'"). The present danger of partisan gerrymandering is obvious to courts and scholars alike. *See, e.g.*, Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 838 (2015) ("[T]he problem of gerrymandering has never been worse in modern American history."). Yet, setting a standard by which to measure the lawfulness of particular partisan gerrymanders has, to date, proven impossible. Today, this Court addresses partisan gerrymandering against the backdrop of this case's long legal history and the many precedential cases that have come before. While I do not agree with all of Judge Niemeyer's analysis, I wholeheartedly join the conclusion that the current Maryland gerrymander infringes the plaintiffs' valuable associational rights protected by the First Amendment. Accordingly, I concur in the judgment invalidating the 2011 reconfiguration of Maryland's Sixth Congressional District.

As the Supreme Court made clear in *Vieth*, a legal standard employed to measure the lawfulness of partisan gerrymanders "must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at

278. Otherwise, it is not justiciable.[1] From 1986 until today, the Court has rejected standard after standard as not workable and, consequently, nonjusticiable. *See Davis v. Bandemer*, 478 U.S. 109 (1986) (articulating, as a plurality, that a justiciable partisan gerrymandering claim requires a showing of intent to discriminate and a denial of a group's chance to influence the political process); *Vieth*, 541 U.S. at 306 (holding that the *Bandemer* plurality standard failed and concluding that partisan gerrymandering claims are effectively nonjusticiable); *Vieth*, 541 U.S. at 317 (Stevens, J., dissenting) (proposing a standard); *Vieth*, 541 U.S. at 343 (Souter, J., dissenting) (same); *Vieth*, 541 U.S. at 355 (Breyer, J., dissenting) (same); *see also Radogno v. Ill. State Bd. of Elections*, No. 11-4884, 2011 WL 5868225, at *2–3 (N.D. Ill. Nov. 22, 2011) (listing rejected partisan gerrymandering standards). Here, Judge Niemeyer, joined by my colleague Judge Russell, puts forth an insightful majority opinion, one with which I agree in many respects. Compelling as the opinion is, though, my reading of *Vieth* and its progeny prevent me from joining it.

I cannot join because Judge Niemeyer's opinion leans on the results of elections in assessing the

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[1] *See Republican Party of N.C. v. Martin*, 980 F.2d 943, 950 (4th Cir. 1992) ("Justiciability concerns 'the power of the federal courts to entertain disputes, and . . . the wisdom of their doing so.") (alteration in original); *Hamilton v. Pallozzi*, 848 F.3d 614, 619 (4th Cir. 2017) ("Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits of an appeal.").

lawfulness of the Maryland gerrymander. His opinion for the Court considers evidence of electoral outcomes as proof that the gerrymander succeeded — in short, that the map-drawers flipped the Sixth District from red to blue. In considering this evidence, the opinion performs a causation analysis — under both the representational rights and associational rights theories — that would ask future courts to discern whether a given electoral outcome resulted from a legislative manipulation of voters or from the voters themselves changing their minds. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 602, 606 (D. Md. 2016) (Bredar, J., dissenting); *see also id.* at 600 ("[T]he courts are not equipped to distinguish those circumstances in which the State has drowned out particular voices from those circumstances in which the chorus voluntarily changed its tune."). The inherent uncertainty in what causes individuals to vote as they do in a particular election makes it challenging — perhaps impossible — to conclude that a given instance of partisan gerrymandering caused an election to turn out as it did. The Supreme Court's requirements for a standard are exacting in this context, so much so that the Court has cast aside numerous attempted standards. Assessing causation by examining the outcome of any given election will always be problematic. And, such a problematic test probably does not satisfy the requirement of *Vieth* that the tool used to gauge lawfulness be "principled, rational, and based upon reasoned distinction." *Vieth*, 541 U.S. at 278. Because this problematic causation analysis permeates Judge Niemeyer's opinion, I write separately.

I concur on narrower grounds, rejecting the representational rights theory once again, *Shapiro*, 203 F. Supp. 3d at 602 & n.2, but embracing much of the associational rights theory. First, the representational rights analysis appears to line up with the many other valiant — though nonetheless rejected — attempts at crafting a standard for partisan gerrymandering claims because it does not articulate a sufficiently concrete and measurable standard. Beyond the causation problems connected to reliance on electoral outcomes for proof, it also leaves unanswered the line-drawing question: how much political consideration is *de minimis* and how much violates the Constitution? *See, e.g.*, *Vieth*, 541 U.S. at 291 (rejecting as not judicially manageable a standard that weighs factors "with an eye to ascertaining whether the particular gerrymander has gone too far"). By contrast, an associational rights analysis — one that is stripped of evidence of electoral outcomes — is different; it poses no line-drawing problem. This narrowed associational rights analysis yields a workable standard that, when applied in this instance, reveals a constitutional violation. Even without any evidence of electoral outcomes, the plaintiffs have established a retaliation violation of their First Amendment right to associate. I therefore concur in the judgment.

As articulated by Judge Niemeyer, plaintiffs can establish a partisan gerrymandering First Amendment retaliation violation involving associational harm when they prove that: (1) those responsible for the redistricting drew the boundaries with the specific

intent to impose a burden on plaintiffs and similarly situated citizens because of how they voted or the political party with which they were affiliated; (2) "the challenged map burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims"; and (3) the map-drawers' intent to burden was a but-for cause of the adverse impact. Part IV, *ante*, at 52. The plaintiffs presented ample evidence of intent, which Judge Niemeyer lays out in detail. *See* Part III.B, *ante*, at 42–45.[3] His opinion also details how the plaintiffs prove harm and causation, citing sufficient evidence to prove a constitutional violation. I add that no mention of electoral outcomes is necessary to prove such a violation, and, indeed, any mention must be omitted to establish a workable standard under *Vieth*.

Regardless of whether the State succeeded in its obvious intent to increase the likelihood that a Democrat would win the Sixth District, the State certainly caused harm. The State targeted voters because of the political party affiliation they claimed (Republican) and with whom they associated (other Republicans). The State *retaliated* against voters for those associations. This harm differs from a violation of representational rights in that it does not matter if "[a voter's] individual vote carries . . . less weight than it did

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[3] Evidence of a map-drawer's intent to impact the election does not pose the same justiciability problems as proving that the election was impacted in fact. The latter is dependent on how people vote. Courts cannot and should not try to answer the question of whether a partisan gerrymander succeeded in changing the outcome of an election. There are simply too many variables in play — variables that courts are not equipped to measure.

before." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). Rather, the gerrymander of Maryland's Sixth Congressional District deprives the disfavored group of voters of its "natural political strength" by building roadblocks to "fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." *Id.* This harm occurs before Election Day and persists long after. And, it is not measured by the outcome of a given election.

Illustrative examples of associational harm exist in the record before this Court. For one, during the 2011 redistricting process, the State divided Frederick County for the first time since 1840. Willis Dep. at 122 (ECF No. 177-14). Frederick County would constitute a community of interest under almost any definition of the term. The redistricting map shows that the State carved out the county seat, the City of Frederick, and siphoned the City and the County's more competitive precincts away from the more solidly Republican precincts. McDonald Expert Report at 23 & Figure 6 (ECF No. 177-19). Sometimes a state may have to divide communities of interest in order to draw equal districts after a movement in population; however, the division of Frederick County is not such a collateral consequence. Coupled with ample evidence of legislative intent, the scooping out of Frederick's county seat and competitive precincts constitutes a blatant targeting of and retaliation against the Republicans in Frederick County. One Frederick County resident, who was

moved from the Sixth to Eighth District, noted that he felt disoriented and disconnected after the redistricting: "I have absolutely no connection with what is in this district except the portions of Frederick that were thrown in." Cueman Dep. at 36–37 (ECF No. 177-55). This is the essence of associational harm.

Here, the plaintiffs establish associational harm because they present evidence, primarily in the form of voter testimony, that the gerrymander "ravaged the party." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). The map-drawers removed over 66,000 registered Republicans from the Sixth District and added over 24,000 Democrats. Joint Stipulations ¶¶ 10, 53 (ECF. No. 177-5). When the redistricting map arose in committee and, subsequently, on the legislative floor, not a single Republican senator or delegate voted for it. Joint Stipulations ¶ 36. The plaintiffs present testimony, which Judge Niemeyer summarizes, Part I.A, *ante*, at 22–25, showing that numerous Republicans from the Sixth District felt disenfranchised and said that their vote no longer mattered. Strine Dep. 61–63 (ECF No. 177-53); Cueman Dep. at 36. The plaintiffs testified that the 2011 redistricting foiled Republican organizational efforts. Volunteers spent significant time helping voters determine in which district they were voting. Ropp Dep. at 36–38 (ECF No. 177-54). And, Republicans lacked enthusiasm, repeating "there's just no point in voting anymore" because it seemed like "a losing race." Strine Dep. at 63. The plaintiffs cite corroborating evidence that Republican voter turnout dropped, and Republican fundraising dropped too.

Voter Turnout Statistics for 2010 and 2014 Maryland Congressional Primary Elections at 3 (ECF No. 191-11); Stein Decl. at 8 (ECF No. 210-3).

Turning to causation, I note that the definition of associational harm simplifies the analysis and avoids any line-drawing problem. For an associational rights violation, the causation analysis stops when the map-drawers sketch the lines, adopt the plan, and make it law. There is no need to look to Election Day. The harm has already occurred. Members of the disadvantaged party have been severed from their preferred associates. Consequently, they feel that voting is futile. Organizers cannot effectively recruit volunteers or fundraise. Ties to communities of interest are diminished. The gerrymander has "ravaged the party" before its members can even go to the ballot box. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). Because map-drawers inevitably move, with each redistricting, some voters into districts in which their votes will carry less weight, any theory that relies on measuring vote dilution depends on drawing a line at which point the dilution is too much. By contrast, under an associational rights theory, any retaliation against a voter based on his or her affiliations is a constitutional violation. For that reason, the theory is more concrete and the violation more measurable.

I conclude that a First Amendment retaliation claim involving associational harm is not only

cognizable,[3] it is capable of measurement and assessment by concrete standards. Such a claim is therefore justiciable in the partisan gerrymandering context. Although I disagree with Judge Niemeyer and Judge Russell's focus on vote dilution and electoral outcomes, I do agree with my colleagues in a principally important respect: the plaintiffs have established as a matter of law that the State retaliated against them in violation of their First Amendment rights. Accordingly, I concur in the judgment docketed with the Court's opinions.

RUSSELL, District Judge, concurring:

I entirely concur in Judge Niemeyer's fine opinion for the Court. There is an illegal, partisan gerrymander in Maryland, and it succeeded in flipping the Sixth District.

I agree with Judge Niemeyer that evidence of impact on election results is relevant and germane to the

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[3] Arguably, as I frame the problem, this is no longer even an issue of "gerrymandering," if that term is understood to be the purposeful drawing of district boundaries to affect the outcome of elections. As I have framed the issue and its resolution, the State here may be guilty of "gerrymandering," but they are also guilty of a separate and different misconduct — the intentional retaliation against certain individuals because of their affiliation with a particular political party. In this sense the case, at least for my purposes, is not about voting or the outcome of particular elections. But it is most certainly about the unjustified and illegal retaliation, by state actors, against individuals in consequence of their having exercised a core constitutional right.

adjudication of associational claims, and that such evidence is non-problematic in that context. However, I also agree with Chief Judge Bredar's separate conclusion that a First Amendment retaliation claim is sufficiently stated and justiciable *without reference to the results of particular elections*. Accordingly, on the record of this case, in addition to joining Judge Niemeyer, I join Chief Judge Bredar's narrower opinion because I agree that the Plaintiffs have proven that they were the victims of First Amendment retaliation wholly apart from the impact on any election. In my view, Plaintiffs prevail on *both* the broad theory articulated by Judge Niemeyer *and* the narrow one expressed by Chief Judge Bredar.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 1:13-cv-03233-JKB
LINDA H. LAMONE, *et al.*,	*	
Defendants.	*	

COMMON CAUSE; THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW; THE CAMPAIGN LEGAL CENTER, INC.,

Amici Supporting Plaintiffs.

JUDGMENT

(Filed Nov. 7, 2018)

For the reasons given in the court's memorandum opinions, the court grants the plaintiffs' motion for summary judgment and denies the defendants' cross-motion for summary judgment.

After the conclusion of the 2018 congressional election, the defendants (referred to as the State) are permanently enjoined from conducting any further election for members of the U.S. House of Representatives from Maryland under the 2011 congressional redistricting plan and are directed forthwith to submit to the court a new congressional redistricting plan that redraws the boundaries of the Sixth Congressional District to address the constitutional violations found

with respect to that District. The State shall do so applying traditional criteria for redistricting — such as geographic contiguity, compactness, regard for natural boundaries and boundaries of political subdivisions, and regard for geographic and other communities of interest — and without considering how citizens are registered to vote or have voted in the past or to what political party they belong. In the circumstances of this case, the State might be well advised to establish a neutral commission to develop a conforming plan. Any new congressional redistricting plan must be approved by this court before it is actually employed.

As time is of the essence to have a new plan in place for conducting the 2020 congressional election, this judgment requires the State to submit its new plan for this court's review before March 7, 2019, at 5:00 p.m. Plaintiffs are required to submit any objections to the plan, along with their reasons, within 30 days after the State submits its plan. The court may deny plaintiffs' objections and accept the State's proposed redistricting plan, sustain the objections and modify the proposed plan, or reject the proposed plan entirely for failing to remedy the constitutional violation. If the court does so reject the proposed plan, the court will refer the redistricting process to the Commission detailed herein.

In the event that the State does not submit a plan by the specified deadline or proposes a plan that is rejected, the court will give the redistricting task to a Congressional District Commission appointed by the court to produce and submit an appropriate plan by

July 8, 2019, for approval by the court. The Commission shall consist of (1) United States Magistrate Judge J. Mark Coulson, as chair, (2) a person designated by the plaintiffs, and (3) a person designated by the State. The parties shall disclose the identity of their designees, none of whom may be employees of the State or the federal government, to each other and the court by January 7, 2019.* The Commission shall then retain a professional map-drawer to assist it. The State shall bear the costs of the Commission, including those of the map-drawer, as part of the costs in this action. The activities of the court-established Congressional District Commission will cease, and the Commission will be dissolved, upon approval by this court of a new congressional redistricting plan regardless of whether the approved plan was first submitted by the State or by the Commission.

Should any party fail to identify a designee to the Commission by January 7, 2019, the court will appoint one.

The State shall use the congressional redistricting plan developed in accordance with this judgment for all elections relating to the 2020 election of members of the U.S. House of Representatives from Maryland.

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* It is by design that the court seeks to establish the Commission two months before the State's deadline for its proposed redistricting plan. Time is of the essence, and the Commission must be ready to act promptly should the State fail to propose a conforming redistricting plan by March 7, 2019.

The Clerk shall assess the costs of this action against the State.

Entered this 7th day of November, 2018.

Circuit Judge Paul V. Niemeyer

Chief District Judge James K. Bredar

District Judge George L. Russell III

/s/ Paul Niemeyer
Paul V. Niemeyer, for the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
THREE-JUDGE COURT

O. John BENISEK, *et al.*,	*	
Plaintiffs	*	
	*	**CIVIL NO.**
v.	*	**JKB-13-3233**
Linda H. LAMONE, *et al.*,	*	
	*	
Defendants	*	

* * * * * * * * * * * * * * * * * * *

MEMORANDUM

(Filed Aug. 24, 2017)

Before NIEMEYER, *Circuit Judge*, and BREDAR and RUSSEL, *District Judges*.

BREDAR, *District Judge*. On May 31, 2017, Plaintiffs O. John Benisek, *et al.* ("Plaintiffs") filed a Rule 65(a) Motion for a Preliminary Injunction and to Advance and Consolidate the Trial on the Merits or, in the Alternative, for Summary Judgment. (ECF No. 177.) The State responded on June 30, 2017, with a Cross-Motion for Summary Judgment. (ECF No. 186.) Both motions have been briefed. On June 28, 2017, this three-judge Court set in a hearing on Plaintiffs' preliminary injunction motion. On its own motion, the Court directed the parties to also address whether further proceedings in this case should be stayed pending the Supreme Court's decision in *Gill v. Whitford*, No. 16-1161, a political gerrymandering case set to be

argued in the forthcoming Term. A hearing on both matters was held on July 14, 2017.[1]

For the reasons explained below, the Court now DENIES Plaintiffs' preliminary injunction motion and STAYS this case pending the outcome of *Whitford*. As set forth in Part II.B, Judge Bredar concludes that such action is necessary because the justiciability of political gerrymandering claims remains in doubt, but the Supreme Court will likely resolve or clarify this threshold jurisdictional matter in its *Whitford* decision. As set forth in Part II.C, Judges Bredar and Russell conclude that Plaintiffs have not made an adequate preliminary showing that they will *likely* prevail on the causation element of their First Amendment retaliation claim. While the Court by no means excludes the possibility that Plaintiffs may ultimately prevail, Plaintiffs have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief. A stay pending further guidance in *Whitford* is appropriate at this juncture.

As set forth in his dissenting opinion, Judge Niemeyer would grant Plaintiffs' motion for preliminary injunctive relief.

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[1] In a pre-hearing scheduling order, the Court made clear that the *only* matters it would take up at the July 14 hearing were Plaintiffs' motion for preliminary injunctive relief and the Court's *sua sponte* request for argument on the propriety of a stay. (ECF No. 190.) The Court did not then, and does not now, rule on the pending cross-motions for summary judgment. Nor has the Court advanced the trial on the merits under Rule 65(a)(2).

I. Procedural History

A review of the recent history of this redistricting case may prove helpful. Following a remand from the Supreme Court on a procedural issue, *see Shapiro v. McManus* (*Shapiro I*), 136 S. Ct. 450 (2015), the case was assigned to a three-judge panel composed of Circuit Judge Niemeyer and District Judges Bredar and Russell. (ECF No. 42.) On March 3, 2016, Plaintiffs filed a Second Amended Complaint challenging Maryland's 2011 congressional districting map as an unconstitutional political gerrymander. (ECF No. 44.) The State moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 51.)

On August 24, 2016, the Court denied the State's motion to dismiss in a 2-1 decision, with Judge Bredar dissenting. *See Shapiro v. McManus* (*Shapiro II*), 203 F. Supp. 3d 579 (D. Md. 2016). In its ruling, the panel majority held that Plaintiffs' Second Amended Complaint stated a justiciable claim for relief. The majority went on to endorse a standard for assessing political gerrymandering claims under the First Amendment:

> When applying First Amendment jurisprudence to redistricting, we conclude that, to state a claim, the plaintiff must allege that those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated. In the context of redistricting, this burden is the *injury* that usually takes the form of *vote*

> *dilution*. . . . [T]o establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. . . . Finally, the plaintiff must allege *causation*—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.
>
> When a plaintiff adequately alleges the three elements of intent, injury, and causation . . . he states a plausible claim that a redistricting map violates the First Amendment and Article I, § 2. Of course . . . the State can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest.

Id. at 596–97.[2]

Following the Court's decision at the pleading stage, the parties entered a contentious period of

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[2] Judge Bredar disagreed that Plaintiffs had identified a workable standard because (1) "the Supreme Court has expressed some degree of tolerance for partisanship in the districting context, but that tolerance creates intractable line-drawing problems"; and (2) courts are ill-equipped to "ascertain those unusual circumstances in which redistricting inflicts an actual, measurable burden on voters' representational rights," yet that is "precisely what the Supreme Court has required." *Shapiro II*, 203 F. Supp. 3d at 601 (Bredar, J., dissenting). Ultimately, Judge Bredar concluded, there is no reliable, administrable standard for "distinguishing electoral outcomes achieved through political gerrymandering from electoral outcomes determined by the natural ebb and flow of politics." *Id.* at 606.

discovery, which resulted in voluminous procedural rulings that need not be reviewed here. At the conclusion of this discovery period, the parties filed their pending motions. (ECF Nos. 177, 186.)

As explained more fully in Part II, the Court concludes that preliminary injunctive relief is inappropriate at this stage because Plaintiffs have not shown that they can likely prevail on each of the three elements of their First Amendment claim. Moreover, any further proceedings—whether in relation to the pending cross-motions for summary judgment or at a bench trial—would be premature because the Supreme Court is poised to consider issues that go to the heart of Plaintiffs' gerrymandering case. Until the Supreme Court speaks, prudence compels this Court to stay further proceedings.

II. Analysis

A. Standard of Decision

1. Preliminary Injunction

Plaintiffs seek preliminary injunctive relief in the form of an order barring the State from enforcing the 2011 redistricting plan and requiring the State to implement a new map in advance of the 2018 midterm elections. To prevail on their motion for such relief, Plaintiffs must show (1) that they are likely to succeed on the merits of their political gerrymandering claim, (2) that they will likely suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction

would serve the public interest. *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). "A preliminary injunction is an 'extraordinary remed[y] involving the exercise of very far-reaching power' and is 'to be granted only sparingly and in limited circumstances.'" *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 588 (4th Cir. 2017) (alteration in original) (quoting *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001)), *cert. granted*, 137 S. Ct. 2080 (2017).

Rule 52(a)(2) of the Federal Rules of Civil Procedure provides that in "granting or refusing an interlocutory injunction, the court must . . . state the findings and conclusions that support its action." *See Greenhill v. Clarke*, 672 F. App'x 259, 260 (4th Cir. 2016) (per curiam) ("Rule 52(a)(2) . . . requires that the district court make particularized findings of fact supporting its decision to grant or deny a preliminary injunction; such findings are necessary in order for an appellate court to conduct meaningful appellate review."); *accord Booker v. Timmons*, 644 F. App'x 219 (4th Cir. 2016) (mem.). Because Judge Bredar's discussion in Part II.B, concerning justiciability, involves a pure question of law, no findings are enumerated in that Part. However, the opinion of the Court in Part II.C, concerning the causation element of Plaintiffs' First Amendment theory, includes findings germane to that issue as well as separately stated conclusions of law. Such findings and conclusions are, given the procedural posture of this case, preliminary, and they will not bind the Court

in any future proceedings. *See Blake v. Balt. Cty.*, 662 F. Supp. 2d 417, 421 (D. Md. 2009) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

2. Stay of Proceedings

The Supreme Court has long recognized that the "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (recognizing that courts enjoy the inherent authority to grant a stay "under their general equity powers and in the efficient management of their dockets"). The decision to stay an action "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254–55; *see also Rogler v. Fotos*, Civ. No. WDQ-14-228, 2015 WL 7253688, at *13 (D. Md. Nov. 17, 2015), *aff'd*, 668 F. App'x 462 (4th Cir. 2016) (mem.); *Cutonilli v. Maryland*, Civ. No. JKB-15-629, 2015 WL 5719572, at *4 (D. Md. Sept. 28, 2015), *appeal dismissed*, 633 F. App'x 839 (4th Cir. 2016) (mem.).

In deciding whether to stay proceedings, a court should consider the likely impact of a stay on each party as well as the "judicial resources that would be saved by avoiding duplicative litigation if the case is in fact stayed." *Mitchell v. Lonza Walkersville, Inc.*, Civ. No. RDB-12-3787, 2013 WL 3776951, at *2 (D. Md. July

17, 2013) (citing *Yearwood v. Johnson & Johnson, Inc.*, Civ. No. RDB-12-1374, 2012 WL 2520865, at *3 (D. Md. June 27, 2012)).

B. Justiciability

At the pleading stage in *Shapiro II*, the panel majority recognized "the justiciability of a claim challenging redistricting under the First Amendment and Article I, § 2, when it alleges intent, injury, and causation." 203 F. Supp. 3d at 598. Judge Bredar disagreed, writing that because (1) Plaintiffs had "not shown that their framework would reliably identify those circumstances in which voters' representational rights have been impermissibly burdened" and (2) no "acceptable alternative framework" had been identified, Plaintiffs' claim must be treated as nonjusticiable. *Id.* at 601–02 (Bredar, J., dissenting). Despite the disagreement among the members of the panel on this threshold issue, the majority opinion remains the law of the case absent reconsideration by at least two judges or intervention by the Supreme Court. This Memorandum does nothing to unsettle that prior decision.

However, this case has long since passed the pleading stage. Plaintiffs now seek preliminary injunctive relief in the form of an order that, if entered, would cause an unprecedented disruption in Maryland's legislative and districting process. In granting such relief, the Court would enjoin enforcement of a map that was duly enacted by the General Assembly of Maryland, *see* Md. Code Ann., Elec. Law §§ 8-701 *et seq.*, and that

survived a voter referendum by a wide margin. The remedy would require emergency action by the legislature. The time and resources necessary to implement a new map would surely have the effect of scuttling other legislative priorities in advance of the 2018 session. The remedy would be highly consequential.

In the arena of legislative and congressional districting, unelected federal judges should exercise great caution before declaring unconstitutional the work product of the people's elected representatives. *Cf. Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment) ("The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out . . . present a political question in the truest sense of the term.").

The preliminary injunction mechanism under Rule 65(a) of the Federal Rules of Civil Procedure does not authorize a federal court to grant such an extraordinary remedy haphazardly. Rather, the court must be confident, among other things, that the plaintiff has shown it is likely to prevail on the merits of its claim. *Winter*, 555 U.S. at 20. That assessment is quite different from the plaintiff-friendly evaluation of the pleadings under Rule 12(b)(6) and the Supreme Court's

decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A court that has made a preliminary legal determination in the plaintiff's favor must decide at the Rule 65(a) stage whether the plaintiff has carried its burden to show it will likely succeed on the merits. Intervening developments in the law and, in particular, signals from appellate courts, must inform this analysis.

In this case, an intervening development casts a cloud over the panel majority's prior ruling as to the justiciability of Plaintiffs' political gerrymandering claim. On June 19, 2017, the Supreme Court agreed to hear argument in *Gill v. Whitford*, No. 16-1161, a direct appeal from a decision by a three-judge panel that enjoined a Wisconsin legislative map as an unconstitutional political gerrymander. Argument is calendared for October 3, 2017. The decision below in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), is fairly remarkable in that it is the first district court opinion since the Supreme Court's splintered ruling in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), to (1) endorse a standard for adjudicating political gerrymandering claims, (2) apply that standard to rule in the plaintiff's favor, and then (3) order the state to draw a new map.[3]

In a 5–4 order, the Supreme Court stayed the district court's judgment pending disposition of the appeal. The Court declined to note probable jurisdiction,

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[3] The *Whitford* panel addressed the remedy separately in an unpublished opinion, *see Whitford v. Gill*, No. 15-cv-421-bbc, 2017 WL 383360 (W.D. Wis. Jan. 27, 2017).

ordering instead that "[f]urther consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." Plaintiffs in this case brush aside the justiciability question in *Whitford* as the "last of the five questions presented" in that appeal (ECF No. 193 at 2), and the dissent makes no mention of *Whitford*. Yet the Supreme Court's decision to hold over the jurisdictional question for argument is a strong signal that the question remains unsettled in the minds of the Justices.

That should come as no surprise. The justiciability of political gerrymandering claims has plagued the Court for decades. As the panel majority observed in *Shapiro II*, six Justices acknowledged in *Bandemer* that such claims are theoretically justiciable, 478 U.S. at 125, but the Court fractured on the standard for adjudicating these claims. Conversely, Chief Justice Burger and Justices O'Connor and Rehnquist would have held that political gerrymandering claims "raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended." *Id.* at 144 (O'Connor, J., concurring in the judgment).

Eighteen years later, the Court revisited the question in *Vieth*, where four Justices (Chief Justice Rehnquist and Justices Scalia, O'Connor, and Thomas) would have held "that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided." 541 U.S. at 281. Justice Kennedy, the swing vote, declined to sign on to the plurality opinion that would have overruled *Bandemer*, but he sounded sharp

notes of caution, writing that there are "weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run." *Id.* at 309 (Kennedy, J., concurring in the judgment); *see also id.* at 317 ("The failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper.").

While the dissent in the instant case states that "five Justices in *Vieth* concluded that the [political gerrymandering] issue remained justiciable," *post*, at 828, Justice Kennedy's opinion was more guarded than that: it was so guarded, in fact, that the plurality characterized it as a "reluctant fifth vote *against* justiciability at district and statewide levels—a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable." *Id.* at 305 (plurality opinion) (emphasis added); *see also* Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 Ohio St. L.J. 1097, 1111 (2007) ("Justice Kennedy's ambivalence leaves it bizarrely unclear where the law of partisan gerrymandering stands. The plurality in *Vieth*, as a result, argued that Justice Kennedy's vote ought to be understood effectively, if not expressly, as 'a reluctant fifth vote against justiciability.'" (footnotes omitted)). Hardly a resounding triumph for those who would ask federal courts to adjudicate

political gerrymandering disputes, *Vieth* was the last case in which the Court squarely confronted the question.[4]

The Supreme Court's willingness to consider and reconsider the justiciability question is understandable, given how fundamental that question is to the exercise (and even the legitimacy) of federal judicial power. Justiciability is a threshold matter that courts are required to evaluate, *sua sponte* if necessary, before reaching the merits of a case. "Justiciability concerns 'the power of the federal courts to entertain disputes, and . . . the wisdom of their doing so.'" *Republican Party of N.C. v. Martin*, 980 F.2d 943, 950 (4th Cir. 1992) (alteration in original) (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991)); *see also Hamilton v. Pallozzi*, 848 F.3d 614, 619 (4th Cir. 2017) ("Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits of an appeal."); *Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 820, 824 (D. Md. 1998) ("It is appropriate for a district court to raise issues of justiciability *sua sponte*.").

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[4] In *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 414 (2006), a majority of Justices declined to address the question of justiciability. Chief Justice Roberts and Justice Alito stressed in a separate opinion that they took "no position on that question, which has divided the Court." *Id.* at 492–93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). Justices Scalia and Thomas reiterated their view that political gerrymandering claims are nonjusticiable. *Id.* at 512 (Scalia, J., concurring in the judgment in part and dissenting in part).

Merely because the Supreme Court has agreed to hear argument in *Whitford* and has deferred the jurisdictional question, it does not necessarily follow that the Court will clear up the ambiguity next Term. The composition of the Court has changed dramatically since *Vieth*, as that case was decided before Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, and Gorsuch took their seats. Nonetheless, it is conceivable that the Justices could again divide as the Court did in *Vieth*, with a majority declining to agree on a standard but with at least five votes for the proposition that some standard might yet exist. Or perhaps the Justices will endorse the standard recognized by the three-judge court in *Whitford*, or some other standard; or perhaps they will rule finally that federal courts may not adjudicate these types of political questions. It would be idle to speculate as to the outcome of a case that has yet to be heard.

But with due respect to the other members of this panel, it would be irresponsible to grant a drastic remedy on the basis of a claim that the Supreme Court may invalidate in a matter of months. We know now that the Court is poised to consider the justiciability question. Guidance of some sort (maybe dispositive guidance) is forthcoming. Accordingly, to suggest that Plaintiffs are likely to prevail on the merits of their claim and to award injunctive relief on that basis would place the cart far ahead of the horse.

This is particularly so in light of a case to which neither party has devoted much attention and which, once again, the dissent does not mention. That case is

Cooper v. Harris, 137 S. Ct. 1455 (2017), a racial gerrymandering case decided late last Term. In a separate opinion, Justice Alito—joined by Chief Justice Roberts and, strikingly, Justice Kennedy—took a dim view on the justiciability of political gerrymandering:

> We have repeatedly acknowledged the problem of distinguishing between racial and political motivations in the redistricting context. . . . As we have acknowledged, "[p]olitics and political considerations are inseparable from districting and apportionment," and it is well known that state legislative majorities very often attempt to gain an electoral advantage through that process. Partisan gerrymandering dates back to the founding, and while some might find it distasteful, "[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering. . . ."

Id. at 1488 (Alito, J., concurring in the judgment in part and dissenting in part) (citations omitted). Justice Alito stressed that the Court's cases require "extraordinary caution" any time the state has "articulated a legitimate political explanation for its districting decision." *Id.* at 1504 (internal quotation marks and citation omitted). He added that "if a court mistakes a political gerrymander for a racial gerrymander, it *illegitimately invades* a traditional domain of state authority, usurping the role of a State's elected representatives." *Id.* at 1490 (emphasis added).

Justice Alito's remarks are non-majority dicta in a case involving a different (though analogous) claim. These remarks should not be treated as proof that any member of the Supreme Court has prejudged the issues on appeal in *Whitford*. *But see Crowe v. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004) ("[C]arefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative." (citation omitted)); *Jordon v. Gilligan*, 500 F.2d 701, 707 (6th Cir. 1974) ("Even the Court's dicta is of persuasive precedential value."); *Fouts v. Md. Cas. Co.*, 30 F.2d 357, 359 (4th Cir. 1929) ("[C]ertainly dicta of the United States Supreme Court should be very persuasive."). However, these remarks are further evidence that the justiciability question is far from settled and will likely be a focal point at the October 2017 argument.

Nothing about this discussion should be taken to suggest that Judge Bredar has decided, as a matter of law, that political gerrymandering claims are nonjusticiable. Indeed, two members of this panel have already decided that such claims *are* justiciable pursuant to the First Amendment framework that Justice Kennedy contemplated in *Vieth*, and the Supreme Court has not—to date—overruled *Bandemer* or held that partisan gerrymandering presents a nonjusticiable political question. Nor has the Court rejected Justice Kennedy's First Amendment theory, though that theory remains nothing more (or less) than a "theory put forward by a Justice of th[e] Court and uncontradicted

by the majority in any . . . cases," *Shapiro I*, 136 S. Ct. at 456.[5]

The dissent simply is incorrect when it states that Judge Bredar advocates "judicial abdication from partisan gerrymandering cases," *post*, at 830. Far from it. A final decision by a majority of Justices instructing lower courts to apply a particular standard to resolve partisan gerrymandering claims would be a welcome development in the law. *See Shapiro II*, 203 F. Supp. 3d at 600 (Bredar, J., dissenting) ("This opinion is not a defense of the State's authority to segregate voters by political affiliation so as to achieve pure partisan ends: such conduct is noxious and has no place in a representative democracy."). The point of this discussion is

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[5] The dissent seems to suggest that political gerrymandering claims *must* be justiciable lest "unacceptable results" obtain, such as a "pointillistic" map that assigns voters to various districts "regardless of their geographical location." *Post*, at 818 (emphasis omitted). This case, of course, does not involve any such extreme practices. Whatever else might be said, Maryland's congressional districts generally adhere to traditional districting principles such as contiguity and the preservation of communities of interest. Should a state legislature ever attempt to implement a pointillistic map, a reviewing court could simply establish a bright line rule requiring *some* degree of contiguity on the theory that pointillism subverts the framers' intentions as expressed in Article I, § 2. A rule barring pointillism would be easy to administer, would not require courts to predict voter behavior, and would not present the thorny line-drawing problems at issue in the typical political gerrymandering case. Pointillism would be the proverbial "easy case" in this context, and the Court would be fortunate indeed to be confronted with such a simple challenge. It is not, though, and we should not oversimplify the challenge of adjudicating the claim that is actually before us on the basis of a hypothetical that has little to do with that claim.

not to suggest that political gerrymandering claims *are not* or *should not* be justiciable; rather, it is to call attention to the uncertainty in the law, an uncertainty that was amplified two months ago when the Court granted argument in *Whitford*. Pausing these proceedings to await further guidance from the Supreme Court is not abdication: it is an expression of prudence, judicial restraint, and respect for the role of a district court that must scrupulously adhere to the instructions of appellate authorities.

Because Plaintiffs are unable at this time to demonstrate that they will likely prevail on the threshold question of justiciability, and because the Supreme Court is poised to act and in so doing may change the legal landscape, Plaintiffs' preliminary injunction motion should be denied and their case stayed pending the Supreme Court's decision in *Whitford*.

C. Causation

1. Preliminary Injunction

Apart from any doubts as to justiciability, and assuming without deciding that Plaintiffs have adduced sufficient evidence to show that the State crafted the 2011 redistricting plan (and the Sixth District in particular) with the "specific intent to impose a burden" on Plaintiffs and similarly situated citizens through vote dilution, *Shapiro II*, 203 F. Supp. 3d at 596, it is unclear whether any such nefarious plan was and remains effective. This Court is not now persuaded that

Plaintiffs will likely prove that "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." *Id.* at 597. Put more simply, the Court is not yet persuaded that it was the gerrymander (versus a host of forces present in every election) that flipped the Sixth District and, more importantly, that will continue to control the electoral outcomes in that district. Voter decisions are mutable and subject to change, despite voting history and party affiliation. As discussed below, the razor's-edge Sixth District race in 2014 is evidence that suggests significant party-crossover voting and calls into doubt whether the State engineered an *effective* gerrymander.

Trial testimony and other evidence, including thorough cross-examination, may yet establish that Plaintiffs have met their burden of proof with respect to causation, but the Court is not persuaded that they have done so now, at least not to the high standard set for the granting of preliminary injunctions. Since but-for causation is an element of Plaintiffs' First Amendment claim, it follows that if Plaintiffs are unable to prove this element, their claim will collapse on its merits. At this stage, the Court cannot say that it is *likely* that Plaintiffs will prevail on this element—only that they *might*. For that reason, the Court must deny Plaintiffs' request for the extraordinary remedy of preliminary injunctive relief.

a. Findings of Fact

Strictly for purposes of deciding whether to enter a preliminary injunction, the Court makes the following findings of fact, *see* Fed. R. Civ. P. 52(a)(2), corresponding to the causation element of Plaintiffs' First Amendment claim:

1. Maryland's 2011 redistricting process involved two parallel procedures: a public-facing procedure led by the Governor's Redistricting Advisory Committee and an internal procedure involving Maryland's congressional delegation and a consulting firm called NCEC Services, Inc. (ECF No. 177–4 at 36:4–13; ECF No. 177–5 ¶ 18.)

2. NCEC in turn designated analyst Eric Hawkins to review the State's redistricting plan and prepare sample maps using voter demographic data (including party affiliation and voting history) and a computer program called "Maptitude for Redistricting." (ECF No. 177–4 at 36:18–37:17.)

3. In performing his analysis, Hawkins relied on a proprietary metric called the Democratic Performance Index (DPI), a weighted average of candidate performance that takes account of voting history. (*Id.* at 24:5–19.) A higher DPI signals a greater statistical likelihood of Democratic candidate success based on past performance.

4. Hawkins created between ten and twenty draft maps. He analyzed six maps alongside proposals submitted by third parties. Each of the six maps would have produced a federal DPI of 52% or greater for the Sixth District, while the third-party submissions would have produced much lower DPIs. (*Id.* at 38:2–9; ECF No. 177–34; ECF No. 177–35 at 31–32.)

5. There is no evidence that Hawkins personally created the final map that was enacted into law. (ECF No. 177–1 at 13 n.9; ECF No. 186–1 at 11.) Former governor Martin O'Malley testified that legislative director Joe Bryce and staff from the Maryland Department of Planning likely created the final document. (ECF No. 177–3 at 53:12–54:7.)

6. The map as enacted had the effect of transferring 360,368 Marylanders *out of* the Sixth District and 350,179 Marylanders *into* the Sixth District. (ECF No. 177–19 at 12.) In the process, 66,417 registered Republicans were removed from the district and 24,460 registered Democrats were added to the district. (*Id.* at 6.)

7. After the 2011 plan was implemented, a plurality (44.8%) of voters in the Sixth District were registered Democrats, while 34.4% of voters were registered Republicans. 20.8% of voters were registered with neither major political party. (ECF No. 186–19 at 5–6.)

8. The "Cook Partisan Voting Index" promulgated by the *Cook Political Report* formerly rated the Sixth District as a safe Republican seat. As a consequence of the 2011 redistricting, the Sixth District is now rated as a "likely" Democratic seat. (ECF No. 177–52 at 8.)

9. In the 2012 congressional election (the first held in the new Sixth District), Democrat John Delaney defeated incumbent Republican congressman Roscoe Bartlett by a 20.9% margin. (ECF No. 177–5 ¶ 54.) However, in the U.S. Senate election conducted that same cycle, Democrat Ben Cardin carried the Sixth District by just 50% of the vote, despite winning 56% of the vote statewide. (ECF No. 186–19 at 10; ECF No. 186–42 PDF at 2.)

10. Congressman Delaney won reelection in 2014 and 2016 by margins of 1.5% and 14.4%, respectively. (ECF No. 177–5 ¶¶ 55–56.)

11. While Plaintiffs have produced expert reports predicting, based on party affiliation and other demographic data, that Democratic candidates will likely fare better under the 2011 plan than under the former plan, Plaintiffs have conducted no statistical sampling and have adduced no individual voter data showing how displaced and current residents of the Sixth District actually voted in 2012, 2014, and 2016.

12. Plaintiffs have not surveyed voters to determine (1) whether former supporters of Congressman Bartlett who remained in the Sixth District after the 2011 redistricting voted for Congressman Delaney instead, (2) whether such voters switched party affiliation or simply selected a different candidate on an *ad hoc* basis, and (3) the reasons underlying these voters' decisions. Nor have Plaintiffs amassed data concerning the voting behavior and preferences of former Sixth District residents who now reside in other congressional districts.

13. Congressman Bartlett underperformed the other seven members of Maryland's congressional delegation in fundraising leading up to his defeat in the 2012 election. (ECF No. 104–13 at 2/2.)

14. In 2014, Republican challenger Dan Bongino nearly unseated Congressman Delaney even though Bongino resided outside the Sixth District (ECF No. 186–20 at 18:15–20) and operated at a financial disadvantage vis-à-vis Delaney (*id.* at 36:21–37:10). Also in 2014, Republican gubernatorial candidate Larry Hogan won 56% of the vote in the Sixth District, besting his Democratic rival by 14 percentage points. (ECF No. 186–19 at 10.)

b. Conclusions of Law

In denying Plaintiffs' preliminary injunction motion, the Court reaches the following conclusions of law:

1. Under *Winter v. NRDC*, a plaintiff seeking preliminary injunctive relief must demonstrate that plaintiff is likely to prevail on the merits of its claim. 555 U.S. at 20.

2. In *Shapiro II*, this Court held that, to state a claim for First Amendment retaliation via gerrymandering, Plaintiffs must allege not only that the gerrymander diluted votes of targeted citizens "to such a degree that it resulted in a tangible and concrete adverse effect" but also that "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." 203 F. Supp. 3d at 597.

3. In other words, the First Amendment framework that the *Shapiro II* majority endorsed requires proof that *but for* the gerrymander, the challenged effect (here, the switch in political power in the Sixth District) would not have happened.

4. The dissent complains that "the majority's new First Amendment standard depends on an *election's results*, not on the adverse impact of dilution on the targeted voters." *Post*, at 837. In the dissent's view,

"the adverse effect is *the dilution* of votes—and the corresponding burdening of expression by voters—regardless of how the election turned out." *Post*, at 837. However, the *Shapiro II* majority recognized that "vote dilution is a matter of degree, and a *de minimis* amount of vote dilution, even if intentionally imposed, may not result in a sufficiently adverse effect on the exercise of First Amendment rights to constitute a cognizable injury." 203 F. Supp. 3d at 596–97. The dissent offers no yardstick to measure vote dilution that exceeds a "*de minimis* amount" yet falls short of altering electoral outcomes. Nor have Plaintiffs shown that they suffered any tangible First Amendment burden other than, perhaps, their inability to elect their preferred candidate. A political gerrymander that imposes nothing more than an abstract "burden" without actually affecting tangible voter rights or interests surely is not justiciable, even pursuant to the framework two judges endorsed in *Shapiro II*.

5. The dissent frets that "under the majority's new standard, no redistricting map could be challenged *before* an election." *Post*, at 837. To whatever extent this critique is accurate, it is a consequence of adjudicating political gerrymandering claims according to the standard adopted in *Shapiro II*. There may be some other, as-yet unidentified standard that would enable courts to enjoin implementation of

a map prior to the first election conducted thereunder, but neither Plaintiffs nor the dissent have proffered any such workable standard here. Strictly prospective relief is relatively uncommon in the law, and courts are far more likely to be tasked with curing or vindicating a prior harm than with anticipating and forestalling a potential one.

6. Citing a handful of First Amendment cases that do not deal with election law, the dissent proposes to import into the political gerrymandering context the burden-shifting framework of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Post*, at 834–36. The Court declines to do so, at least at this preliminary stage. As the dissent explains, *Mt. Healthy* stands for the proposition that "where the government takes an injurious action, an injured party need not show that the government would never have taken the same action anyway." *Post*, at 835–36. *Mt. Healthy* assumes an injury has occurred and focuses on questions of motive and intent. The problem is that in the redistricting context, the government's "action" is only "injurious" if it actually alters the outcome of an election (or otherwise works some tangible, measurable harm on the electorate). In other words, the question of but-for causation is closely linked to the very existence of an injury: if an election result is not engineered through a

gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred.

7. For this reason, the dissent's poisoning hypothetical, *post*, at 837–38, is beside the point. If a victim sips poison, or trains collide, or an employee is fired, or a homeowner's request for a zoning variance is denied, there is no question that an injury of one sort or another has occurred. The question for courts to resolve in such cases is whether that injury was caused by some illicit action (or inaction) of the defendant and whether the defendant has an adequate defense to the charge. But if Roscoe Bartlett loses to John Delaney, voters are thereby injured if but only if that loss is attributable to gerrymandering or some other constitutionally suspect activity. If the loss is instead a consequence of voter choice, that is not an *injury*. It is *democracy*.

8. But-for causation—not some metaphysical, could-be burden—is the standard that controls in this case, and Plaintiffs bear the burden to prove this element is satisfied. Assuming that Maryland's former congressional map provides an acceptable benchmark for assessing the 2011 map, this but-for causation requirement would be satisfied *only* if Roscoe Bartlett would have won reelection in 2012 had the prior map remained intact (with minor adjustments to account for

demographic changes reflected by the 2010 Census). Plaintiffs admit as much: "[O]ur burden is to show that the purposeful dilution of Republican votes in the Sixth District was a but-for cause of the routing of Roscoe Bartlett in 2012 and of the Republican losses in 2014 and 2016." (ECF No. 191 at 13.)[6]

9. The fact that John Delaney defeated Roscoe Bartlett by an impressive 20.9% margin in 2012 may shed some light on the effectiveness of the alleged gerrymander. However, even a much smaller victory by Delaney would have shifted the Sixth District seat from Republican to Democratic control. The dispositive question is whether the shift would have occurred absent the alleged gerrymander—that is, whether Delaney would have prevailed (even if by a much smaller margin)

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[6] *But see Shapiro II*, 203 F. Supp. 3d at 606 (Bredar, J., dissenting) ("Because of the inherent mutability of political affiliation, the Court cannot simply compare the results of an election conducted pursuant to Map X with those of a subsequent election conducted pursuant to Map Y and blame any shift in power on redistricting: each election cycle is unique, and voter behavior is as unpredictable as the broader societal circumstances that may make one candidate, or one party, more appealing than the other to particular voters and communities. For that matter, treating a prior map as a baseline for measuring the constitutionality of a subsequent map assumes that the prior map was itself free of impermissible manipulation—yet we know, as a practical matter, that gerrymandering is widespread in our political system and as old as the Republic."); *LULAC*, 548 U.S. at 446 (Kennedy, J.) ("There is no reason . . . why the old district has any special claim to fairness.").

absent the State's reliance on NCEC's DPI and demographic data.

10. Upon the record, the briefs, and the hearing, the Court cannot now conclude that the *likely* outcome of this litigation is a finding that, but for the alleged gerrymander, the Republican Party would have retained control of the Sixth District congressional seat. Plaintiffs have not produced voter sampling or statistical data, affidavits, or other evidence of a sufficient quantity to demonstrate *how* and *why* voters who would have been included in a neutrally drafted Sixth District voted in the 2012, 2014, and 2016 elections. Without such data, the Court cannot reverse-engineer those elections and is unprepared to assume, at this preliminary stage, that enough such voters would have voted for the Republican candidate so as to preserve Republican control.

11. While Plaintiffs have adduced some persuasive predictive evidence through the Cook Partisan Voting Index and expert reports and testimony, the Court is unconvinced, certainly by the standard governing the issuance of a preliminary injunction, that such evidence is determinative of but-for causation. In particular, the Court is not convinced that such predictive evidence accurately accounts for subjective factors such as evolving political temperament and the personal strengths or weaknesses of individual

candidates. The surprising results of various elections in 2016 illustrate the limitations of even the most sophisticated predictive measures. Experience teaches that voter preferences are mutable and that American democracy is characterized by a degree of volatility and unpredictability. *See Bandemer*, 478 U.S. at 160 (O'Connor, J., concurring in the judgment) ("To allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence.").

12. The Court is especially reluctant at this preliminary stage, absent more concrete voter data, to find an effective gerrymander given that Congressman Delaney nearly lost control of his seat in 2014 in a race against a candidate burdened with undisputed geographic and financial limitations.

13. Indeed, this recent near defeat raises serious doubts about whether Plaintiffs' alleged injury is likely to recur. The most relevant question in a case involving a claim for solely injunctive relief is not whether a harm may have occurred in the past but whether the harm is presently occurring or very likely to recur. If the injury, if any, has long since concluded, there is nothing to enjoin. *See Bloodgood*

v. Garraghty, 783 F.2d 470, 475 (4th Cir. 1986) ("An injunction is a drastic remedy and will not issue unless there is an imminent threat of illegal action. '[An i]njunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future.'" (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931))); *cf. Beck v. McDonald*, 848 F.3d 262, 277 (4th Cir. 2017) ("'[A]bsent a sufficient likelihood that [Plaintiffs] will again be wronged in a similar way' . . . past events, disconcerting as they may be, are not sufficient to confer standing to seek injunctive relief." (alteration in original) (citations omitted)); *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991) ("The courts should be especially mindful of th[e] limited role [prescribed by Article III] when they are asked to award prospective equitable relief . . . for a concrete past harm, and a plaintiff's past injury does not necessarily confer standing upon him to enjoin the possibility of future injuries.").

14. Despite the Court's present doubt as to Plaintiffs' proof on the causation prong of their First Amendment claim, the Court does not hold that Plaintiffs *cannot* prevail on their claim. Any such holding would be every bit as premature as the extraordinary relief that Plaintiffs have requested and that the dissent urges. The

> Court simply concludes that Plaintiffs have not carried their burden to show they are *likely* to prevail on the merits, and so preliminary injunctive relief is not proper.
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> 15. The Court remains open to the possibility that the evidence Plaintiffs have adduced, when subject to robust cross-examination and the development that only a trial can bring, may satisfy Plaintiffs' burden of proof. The Court also is willing to entertain requests by either party to reopen discovery (subject to the stay discussed immediately below) to address the evidentiary gaps and deficits or potential deficits flagged in this Memorandum. Regardless whether either party seeks additional discovery, the parties may find it helpful to take account of the Court's discussion here in any future briefs or oral presentations.

2. Stay of Proceedings

The Court's concerns about Plaintiffs' proof with respect to the causation element of their First Amendment claim compel the Court not only to deny preliminary injunctive relief but also to stay proceedings pending the Supreme Court's further guidance in *Whitford*.

While Plaintiffs argue vociferously that "[t]his case and the Wisconsin case are fundamentally different" (ECF No. 193 at 4), this Court disagrees.

Fundamentally, these cases are two sides of the same coin: both propose a standard by which federal courts might adjudicate claims of unlawful political gerrymandering. Both cases invoke the First Amendment as a source of constitutional authority. And the standard that the Western District of Wisconsin has endorsed is remarkably similar to the standard endorsed by the majority in *Shapiro II*: "We conclude," the Wisconsin court wrote, "that the First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." *Whitford*, 218 F. Supp. 3d at 884.

True, the cases differ in their particulars. The Wisconsin case is a statewide challenge to state legislative districts, based in part on partisan asymmetry (the so-called "efficiency gap"); the Maryland case is a single-district challenge to a congressional district, grounded in a retaliation theory. For plaintiffs in either case to prevail, however, they would have to show that the gerrymander about which they complain actually inflicted a constitutional injury on them, one that is sufficiently personal so as to satisfy the threshold requirements of Article III and sufficiently definite and clear so as to justify the drastic remedy of an injunction against enforcement of an otherwise lawfully enacted map. In determining whether a constitutional injury has occurred, the court invariably must reach the question of causation, for if election outcomes (whether in a

single district or across the state) arise not from political machinations at the statehouse but instead from neutral forces or the "natural ebb and flow of politics," *Shapiro II*, 203 F. Supp. 3d at 606 (Bredar, J., dissenting), no injury has occurred and no remedy may issue. While the Supreme Court's decision in *Whitford* may not prove dispositive of *Benisek*, the Court's analysis undoubtedly will shed light on critical questions in this case, and the parties and the panel will be best served by awaiting that guidance.

D. Additional Practical Considerations Supporting the Decision to Stay Proceedings

Two practical considerations bolster the Court's conclusion that a stay is appropriate at this time.

First: this Court is in no position to award Plaintiffs the remedy they have requested on the timetable they have demanded. For the reasons explained in Part II.C, two members of this panel are unconvinced that Plaintiffs will *likely* prevail on the causation element of their First Amendment claim. Plaintiffs therefore are not entitled to preliminary injunctive relief. This case will likely require a full trial on the merits, where witnesses for both parties will be subject to cross-examination and where the Court will be equipped to make detailed findings and credibility determinations. But a trial—particularly one requiring the coordination of three judges and their respective chambers staff—is a substantial undertaking.

Plaintiffs have indicated that a revised districting plan must be enacted no later than December 19, 2017, to allow orderly implementation in advance of the 2018 midterms. (ECF No. 177-1 at 31.) Plaintiffs also have suggested that an injunction should issue no later than August 18, 2017, to accommodate legislative mapmaking or, if necessary, a judicially imposed map. (*Id.* at 32.) Despite the Court's diligence in ruling on the pending preliminary injunction motion (which has been a priority for each member of this panel), that August date has already come and gone. Since the Court cannot deliver the remedy Plaintiffs have requested, Plaintiffs' opposition to a stay pending *Whitford* loses considerable force. It is unclear what hardship Plaintiffs will suffer by waiting a few months if, as a practical matter, the Court would have been unable to cure any constitutional ill in advance of the 2018 midterms even had it scheduled a trial at the earliest opportunity.[7]

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[7] Plaintiffs alternatively propose that the Court should enter a permanent injunction and then stay enforcement of that injunction so that the parties may expeditiously take their appeal. (ECF No. 193 at 3.) The Court declines to do so. The Court will not abandon its duty to conscientiously resolve this years-long dispute so that the parties may squeeze their case onto the Supreme Court's fall calendar. Nor will the Court make the findings that would support a permanent injunction—including that Plaintiffs have suffered an irreparable injury and that, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted," *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)—only to then stay that equitable remedy. Rather, the Court will enjoin the State to implement a new map if *but only if* it becomes persuaded that Plaintiffs have proved each element

Second: while the Supreme Court no doubt benefits from the efforts of lower courts in resolving difficult legal issues, it is not clear how additional proceedings in this case would aid the Court's resolution of *Whitford*. The threshold justiciability question that the Court must again confront in *Whitford* is hardly a novel one, and this panel has rigorously analyzed that threshold question in the separate opinions in *Shapiro II*. The *Whitford* litigants and the Justices will have access to those opinions during the forthcoming proceedings. Further, as the divergent opinions in *Vieth* illustrate, the Justices are not bound to decide *Whitford* along the lines that the Western District of Wisconsin found persuasive. If the First Amendment theory that Plaintiffs here have proposed and that two members of this panel have recognized as justiciable strikes one or more of the Justices as workable, the Justices certainly may adopt, co-opt, modify, or otherwise incorporate elements of that theory into a framework for decision or a possible framework for future cases.

Here is the bottom line: a stay in these proceedings will not preclude the Supreme Court from taking advantage of the important legal work that has been done in this case, and the marginal gains—if any—that further fact-finding might offer the Justices would be greatly outweighed by the efficiency costs of charging ahead only to later learn that Plaintiffs must return to

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of their First Amendment claim to the requisite degree of certainty.

square one (or, perhaps, that their action is no longer viable).

III. Conclusion

Though the members of this panel differ in their views concerning the implications of Supreme Court precedent, the evidence Plaintiffs have thus far adduced, and the efficient management of this complicated and important case, all agree that political gerrymandering is a noxious and destructive practice. The segregation of voters by political affiliation so as to achieve purely partisan ends is repugnant to representative democracy. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). This Court will not shrink from its responsibility to adjudicate any viable claim that such segregation has occurred in Maryland. But in order to *correctly* adjudicate such a claim, the Court must first insure that it is proceeding on the correct legal foundation—that in measuring the legality and constitutionality of any redistricting plan in Maryland it is measuring that plan according to the proper legal standard. Following the Supreme Court's decision in *Whitford*, this panel will be better equipped to make that legal determination and to chart a wise course for further proceedings.

For the foregoing reasons, an Order shall enter DENYING Plaintiffs' preliminary injunction motion, and a separate Order shall enter HOLDING IN ABEYANCE the pending cross-motions for summary

judgment and STAYING further proceedings pending the Supreme Court's decision in *Whitford*.

Judge Russell joins all but Part II.B of this Memorandum and joins the accompanying Orders. Judge Niemeyer joins neither the Memorandum nor the Orders.

NIEMEYER, Circuit Judge, dissenting:

In denying the plaintiffs' motion for a preliminary injunction, the majority overlooks the obvious and relies on abstract notions of the causal relationship between intent and effect that bear no relationship to the real world evidence regarding the conduct at issue or to the First Amendment standard adopted in this case. Its entire reason for denying the injunction rests on a bizarre notion of causation that requires the exclusion of all possible alternative explanations, however remote and speculative. When that effort inevitably fails, it concludes that causation has not been established, despite extraordinarily strong evidence of the connection between intent and effect. I believe that the record could not be clearer that the mapmakers specifically intended to dilute the effectiveness of Republican voters in the Sixth Congressional District and that the actual dilution that they accomplished was caused by their intent. Accordingly, the motion should be granted.

The record demonstrates, without any serious contrary evidence, that the Maryland Democrats who

were responsible for redrawing congressional districts in 2011 *specifically* intended to dilute the votes of Republicans in the Sixth District and in fact did so. They identified likely Republican voters and moved them in large numbers into the Eighth District, which had a safe margin of Democratic voters. They simultaneously replaced these Republican voters with Democratic voters from the Eighth District. More specifically, they moved 360,000 persons (roughly one-half of the District's population) out of the former Sixth District — when only 10,000 had to be moved in response to the 2010 census — and simultaneously moved 350,000 into the "new" Sixth District. And critically, in making those moves, they focused on voting histories and party registration to move 66,400 registered Republicans out of the Sixth District and replace them with 24,400 registered Democrats, creating a Democratic voter majority in the new Sixth District of 192,820 Democrats to 145,620 Republicans. Prior to the massive shuffle, the Sixth District had 208,024 Republicans and 159,715 Democrats. This 2011 shuffle accomplished the single largest redistricting swing of one party to another of any congressional district in the Nation.

Consistent with this evidence, the State's Democratic leadership stated that their reshuffling of voters by voting history was specifically intended to flip the Sixth District from Republican to Democratic so as to create a 7 to 1 Democratic congressional delegation. For example, Maryland Governor Martin O'Malley, who led the effort to develop a new congressional map after the 2010 census, stated that he wanted to redraw

the lines of the Sixth District to "put more Democrats and Independents into the Sixth District" and ensure "the election of another Democrat." He added, "Yes, this was clearly my intent." And other Democrats involved in the process similarly revealed their intent with statements indicating, for example, that the Sixth District was redrawn to "minimize the voice of the Republicans" and to "hit[]" Republican Congressman Roscoe Bartlett from the Sixth District "pretty hard." Moreover, the firm hired to draw the map was given only two instructions — to come up with a map (1) that protected the six incumbent Democrats and (2) that would produce a 7 to 1 congressional delegation.

Republican voters affected by the redrawing of the Sixth District commenced this action, contending that they were targeted, based on the way they voted in the past, with the intent to dilute their vote and diminish their representational rights, in violation of the First Amendment. On the State's motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), we held that the plaintiffs stated a cause of action and would succeed in their challenge of the Sixth District's gerrymander if they were to demonstrate (1) that the mapdrawers redrew the district lines with the specific intent to impose a burden on voters because of how they voted in the past or because of the political party with which they were affiliated; (2) that the targeted voters suffered a tangible, concrete burden on their representational rights; and (3) that the mapdrawers' intent to burden a particular group of voters by reason of their views was the but-for cause of the concrete

effect. Simply, the standard requires a showing of (1) specific intent, (2) concrete effect, and (3) causation between the first two requirements. *See Shapiro v. McManus*, 203 F. Supp. 3d 579, 596–97 (D. Md. 2016).

Following the completion of extensive discovery, the plaintiffs filed a motion for a preliminary injunction with a request to advance the trial on the merits under Rule 65(a)(2) so as to obtain a final injunction ordering a redrawing of the lines defining the Sixth District without the use of data that reveal how voters registered or voted in the past.

* * *

The widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy. Indeed, both Democrats and Republicans have decried it when wielded by their opponents but nonetheless continue to gerrymander in their own self interest when given the opportunity. The problem is cancerous, undermining the fundamental tenets of our form of democracy. Indeed, as Judge Bredar has observed in this case, gerrymandering is a "noxious" practice with "no place in a representative democracy." *Shapiro*, 203 F. Supp. 3d at 600 (Bredar, J., dissenting).

The Supreme Court has joined the chorus of voices recognizing the potential ills inflicted on our democracy by gerrymandering. Accepting the general proposition that partisan gerrymandering, when sufficiently extreme, violates the Constitution, the Justices have nonetheless yet to agree on a standard for determining

when the practice crosses the line. *See Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.* at 308 (Kennedy, J., concurring in the judgment). For this reason, a minority of the Justices have indicated that the issue of whether partisan gerrymandering violates the Equal Protection Clause is not justiciable. *See id.* at 305.

But a categorical rule that would abandon efforts at judicial review surely cannot be accepted lest it lead to unacceptable results. For instance, in Maryland, which has a voting population that historically votes roughly 60% for Democrats and 40% for Republicans, the Democrats, as the controlling party, could theoretically create eight safe Democratic congressional districts by assigning to each district six Democrats for every four Republicans, *regardless of their geographical location.* Citizens residing in Baltimore City, others residing in Garrett County in the western portion of the state, and yet others residing in the suburbs of Washington, D.C., could all be assigned to a single district so that the Democrats would outnumber Republicans by a margin of 60% to 40%. Under such a map, no district would have a single boundary, nor indeed any relationship to geography or to the communities that constitute the State, and neighbors would have different Representatives. Such a pointillistic map would, of course, be an absurd warping of the concept of representation, resulting in the very "tyranny of the majority" feared by the Founders. Yet, such an extreme possibility would be open to the most politically

ambitious were courts categorically to abandon all judicial review of political gerrymandering.

I believe that the First Amendment standard previously adopted by us in this case does not allow for such a possibility. Building on the Supreme Court's previous holdings that ensure "one person, one vote" and that prevent racially motivated gerrymanders, we held earlier in this case that when district mapdrawers target voters based on their prior, constitutionally protected expression in voting and dilute their votes, the conduct violates the First Amendment, effectively punishing voters for the content of their voting practices. *See Shapiro*, 203 F. Supp. 3d at 595–96. This First Amendment test focuses *on the motive* for manipulating district lines, *and the effect* the manipulation has on voters, *not on the result* of the vote. It is therefore sufficient in proving a violation under this standard to show that a voter was targeted because of the way he voted in the past and that the action put the voter at a concrete disadvantage. The harm is not found in any particular election statistic, nor even in the outcome of an election, but instead on the intentional and targeted burdening of the effective exercise of a First Amendment representational right. Recent comments of Supreme Court Justices made both in this case and in *Vieth* have suggested that this standard is available for assessing the constitutionality of a gerrymander. And under this standard, I respectfully conclude, the plaintiffs have succeeded in carrying their burden.

The majority instead expresses doubts as to whether the earthquake upheaval in the political

landscape of the Sixth District was attributable to the fulfillment of the Democrats' gerrymandering plan, positing that the flip of the Sixth District might have been attributable to changes in voting preferences or other demographics. But this view reflects nothing more than an effort to skirt around the obvious — that the Democrats set out to flip the Sixth District; that they made massive shifts in voter population based on registration and voting records to accomplish their goal; and that they succeeded.

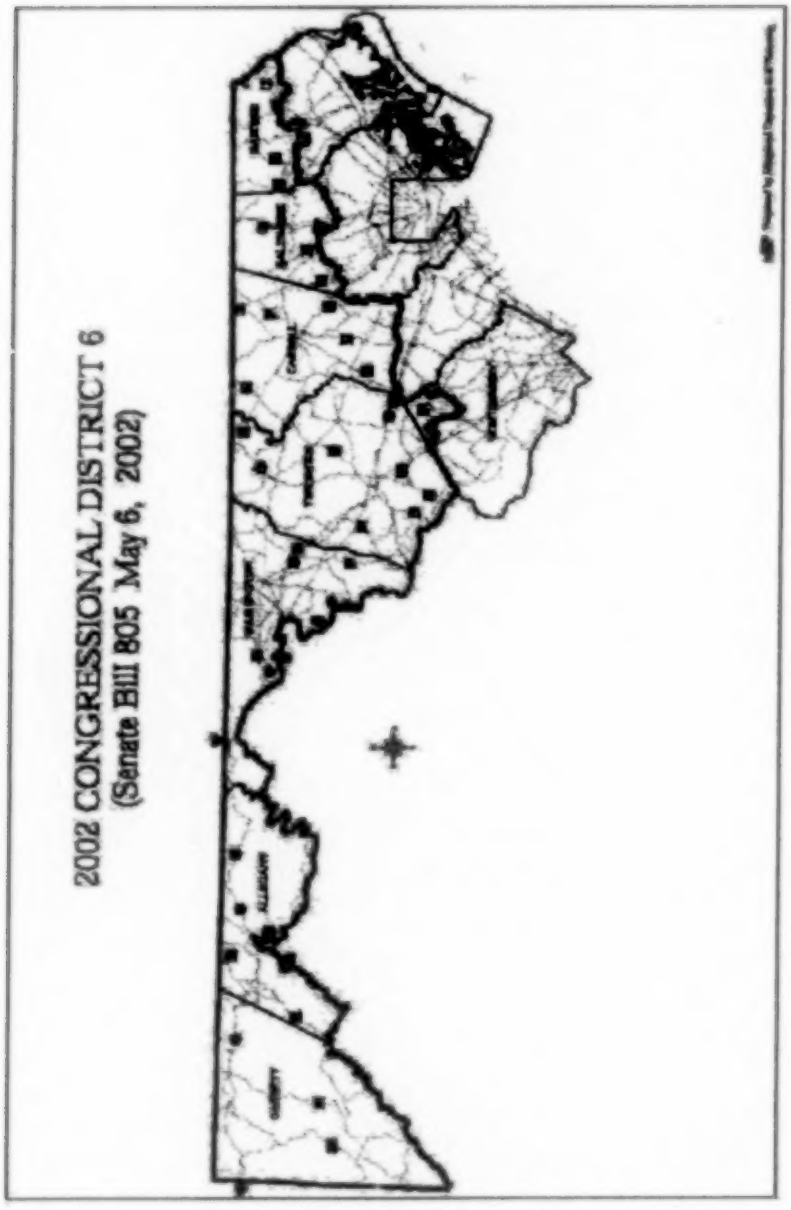
The plaintiffs have not only made the requisite showing that they are likely to succeed on the merits, they have actually succeeded well in demonstrating that the State's gerrymandering violated their First Amendment rights. I would accordingly issue the injunction requested and require the redrawing of the Sixth District's boundaries without the use of information about how citizens voted in the past.

I

A. Facts of Record

The historical facts of record are not disputed. Following the 2010 census, the State of Maryland was required to redraw the lines of its eight congressional districts to ensure that each district had an equal share of the State's population. This action focuses on the boundaries that the State chose to draw for the Sixth District.

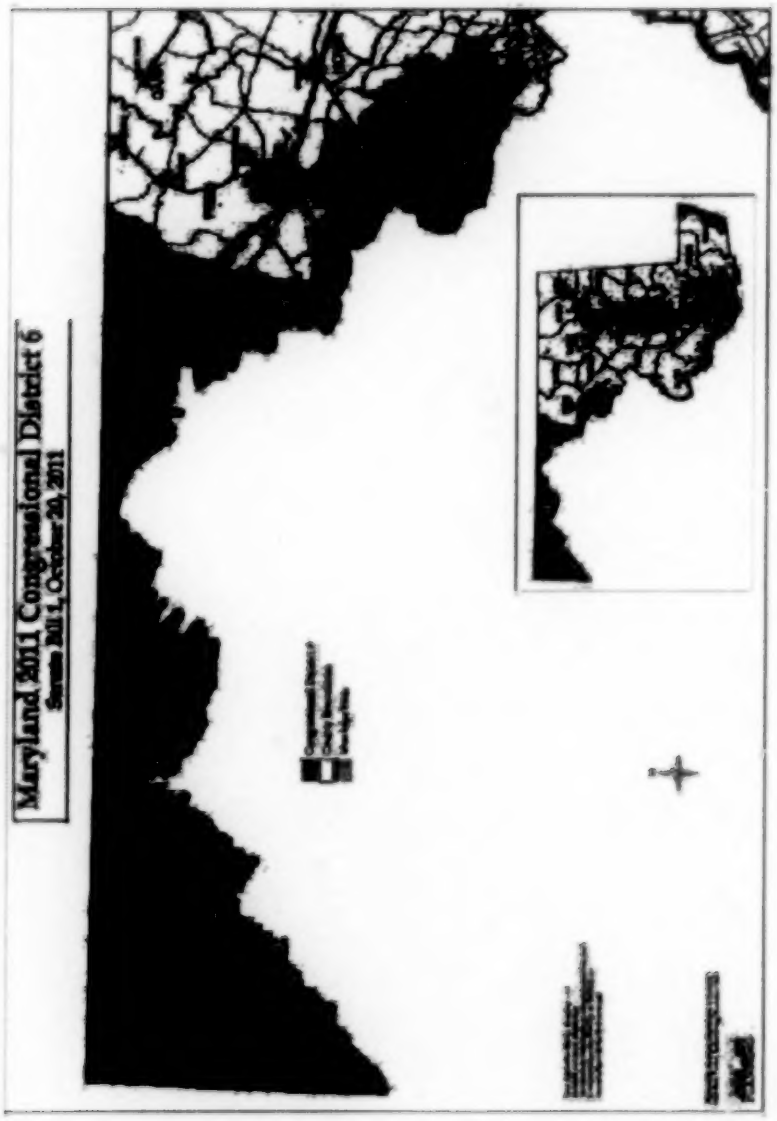
Historically, the Sixth District included western Maryland and much of north-central Maryland, and after the Supreme Court's announcement of the "one person, one vote" rule in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Sixth District had always included all of the State's five most northwestern counties — Garrett, Allegany, Washington, Frederick, and Carroll Counties. After the 2002 redistricting, the District also included a small northern portion of Montgomery County and larger portions of Baltimore and Harford Counties, as shown.


2002 CONGRESSIONAL DISTRICT 6
(Senate Bill 805 May 6, 2002)

At the time of the 2010 congressional election — the last held prior to the 2011 redistricting — 47% of the District's 446,000 eligible voters were registered Republicans, 36% were registered Democrats, and 16% were registered Unaffiliated, making the District the most Republican in the State. Joint Stipulations ¶ 10 & Ex. 2 at 2 (ECF No. 104). Representative Roscoe Bartlett, a Republican, had continuously represented the District since 1993, and he won reelection in 2010 by a margin of 28%. *Id.* ¶ 8.

The 2010 census showed that the Sixth District had grown somewhat, having 10,186 residents more than the ideal adjusted population of 721,529 for a Maryland congressional district, a variation of only 1.4%. Joint Stipulations ¶¶ 9, 52. Nonetheless, the Democratic mapdrawers responsible for the 2011 redistricting plan redrew the District's boundaries far more dramatically than was necessary to move 10,186 voters from the District. Indeed, the new Sixth District retained only 51% of its original population, retaining the residents of Garrett, Allegany, Washington Counties, and a portion of the residents of Frederick County and moved the other half — roughly 360,000 residents — to other districts. Approximately 60% of these residents — those from Frederick County and more than half the population of Carroll County — were shifted into the Eighth District, which had previously been confined almost entirely to the heavily Democratic Montgomery County. In the place of the removed residents, the plan added to the new Sixth District approximately 350,000 residents from Montgomery County,

most of whom had previously been assigned to the Eighth District. The final 2011 map for the Sixth District was as follows:


Maryland 2011 Congressional District 6
Senate Bill 1, October 20, 2011

The area removed from the former Sixth District was predominately Republican, while the area added was predominately Democratic. Specifically, in the precincts removed from the Sixth District, there were on average approximately 1.5 times as many registered Republicans as Democrats. By contrast, in the precincts added to Sixth District, registered Democrats outnumbered Republicans by more than 2 to 1. In total, the reshuffling of the Sixth District's boundaries resulted in a net reduction of more than 66,000 registered Republicans and a net increase of some 24,000 registered Democrats, for a swing of about 90,000 voters. *See* Opening Expert Report of Dr. Peter A. Morrison ¶ 134 & tbl. 1 (ECF No. 177-35); Opening Expert Report of Prof. Michael P. McDonald at 12 (ECF No. 177-19).

Not surprisingly, this major reshuffling of the Sixth District's population directly affected the District's political complexion. At the time of the 2012 congressional election (the first held under the new map), the major parties' respective shares of the District's registered voters roughly reversed compared to just two years before. Of the new District's roughly 437,000 eligible voters, 33% were registered Republicans, 44% were registered Democrats, and 22% were registered as Unaffiliated. Joint Stipulations ¶ 53 & Ex. 19. In the 2012 election, Democratic candidate John Delaney, a newcomer to politics, defeated Republican incumbent Bartlett by a 21% margin, and he was elected again in 2014 and 2016. *Id.* ¶ 54.

The parties have stipulated that "[o]ne widely understood consequence of the Plan was that it would make it more likely that a Democrat rather than a Republican would be elected as representative from the [Sixth] District." Joint Stipulations ¶ 31. But the record demonstrates even more. Far from being an incidental, though anticipated, byproduct of achieving some other set of redistricting goals, the Maryland Democrats who controlled the 2011 redistricting process sought to assure themselves of a 7 to 1 Democratic delegation by flipping the Sixth District to Democratic control.

Governor O'Malley, who was both "the leader of [Maryland's] Democratic Party," O'Malley Dep. 46:20–21 (ECF No. 177-3), and "directly in charge of running the congressional redistricting process," *id.* at 30:19–20, agreed that he "set out to draw the borders in a way that was favorable to the Democratic Party," *id.* at 9:22–10:2. As he later testified:

> [T]hose of us in leadership positions in our party, the Speaker, the Senate President, the Democratic Dean of the Delegation, myself, Lieutenant Governor, we all understood that, while our — while we must fulfill our responsibility on redistricting, must be mindful of constitutional guidelines, restrictions, case law, statutes, it was also — part of our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them. Yes, that was clearly one of our many [goals].

Id. at 81:1–11. Specifically, O'Malley wanted to use the redistricting process to change the overall composition of the U.S. House Delegation to seven Democrats and one Republican by flipping either the First District, on the eastern shore of Maryland, or the Sixth District, in Western Maryland. *Id.* at 22–27. Because altering the political makeup of the First District, the only other Maryland district represented by a Republican, would have required awkwardly "jump[ing] the Chesapeake Bay and draw[ing] a line in such a way that [would] put[] . . . more Democratic voters [in] the Eastern Shore [district]," *id.* at 24:16–19, he stated that "*a decision was made to go for the Sixth*," *id.* at 27:3–4.

Following the customary process in Maryland, Governor O'Malley pursued two courses for developing a revised congressional map. For one, he created the public-facing "Governor's Redistricting Advisory Committee," and for the other, he "asked Congressman [Steny] Hoyer, . . . the dean of the [U.S.] House delegation," to "lead the effort . . . to inform the [Committee] about congressional redistricting" and "come up with a map that a majority of the congressional delegation supports." O'Malley Dep. 47:20–48:5; *see also* Willis Dep. 185–88 (ECF No. 177-14) (agreeing that, historically, "[t]he process starts with the [Democratic] members of Congress," who "[e]ndeavor to come to a consensus," "and then it flows to the governor and legislators," who "do their best to respect the wishes . . . of the congressional delegation"). Consistent with this customary procedure, the record shows that the work performed on behalf of the Democratic members of

Maryland's congressional delegation largely shaped the contours of the new Sixth District that the Advisory Committee ultimately recommended to Governor O'Malley. *See* Miller Dep. 97:19 (ECF No. 177-15) (testifying that the map "primarily was drawn by the congressional people").

The Advisory Committee held public hearings across the State from July through September 2011 and received comments from members of the public. Joint Stipulations ¶ 22. At hearings conducted in western Maryland, residents provided suggestions regarding potential changes to the shape of the Sixth District. Several of these residents testified about various connections between Frederick County and Montgomery County — including Interstate 270 ("I-270"), a 35-mile highway running between the City of Frederick and southern Montgomery County — and advocated for replacing part of the Sixth District with territory from Montgomery County. None of the speakers contemplated a map that would remove much of Frederick County *itself*, which had been included in its entirety in the Sixth District since 1872. *See, e.g.*, Public Hearing Testimony (ECF No. 186-3) at MCM 000029–31 ("[T]he start of the Sixth District is pretty easy, with Garrett, Allegany, Washington, and Frederick, you've got a nucleus there. . . . Once you start with those four counties, . . . your orientation should be to go east into either Howard, or go southeast into Montgomery Counties, to the greatest extent possible, and . . . leave Harford, Baltimore, and even portions of Carroll for a Baltimore-oriented district").

While the Advisory Committee was holding public hearings across the State, the Democratic members of Maryland's U.S. House Delegation — led by Representative Hoyer, a self-described "serial gerrymanderer," ECF No. 191-3 — had already begun to redraw the State's congressional map. Indeed, around the time that the results of the 2010 census became available in late February/early March 2011 — months before the Advisory Committee was even created — Hoyer and the other Maryland Democrats in the House retained NCEC Services, Inc., a political consulting firm that provides "electoral analysis, campaign strategy, political targeting, and GIS [geographic information system] services" to Democratic organizations. ECF No. 177-17; *see also* Hawkins Dep. 28–31 (ECF No. 177-4); ECF No. 177-18. NCEC was specifically charged with drawing a map that maximized "incumbent protection" for Democrats and changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican, and it was given no other instruction as how to draw the map. Hawkins Dep. 40–42, 47–49.

The primary NCEC analyst assigned to the task, Eric Hawkins, analyzed various congressional redistricting plans to inform the Democratic members of the Maryland delegation how "different options would change their districts," and he personally prepared between 10 and 20 different draft congressional maps using a GIS computer software program called Maptitude for Redistricting. Hawkins Dep. 36–38. Maptitude allows users to "[c]reate districts using any

level of geography," "[a]dd political data and election results," and "[u]pdate historic results to new political boundaries." Joint Stipulations ¶ 28. With Maptitude, "data reflecting . . . citizens' political party affiliation and voting histories[] can be used to determine how the outcome of historical elections would have changed . . . if the proposed plan had been in place in prior years," *id.* ¶ 30, thus enabling users to accurately predict the likely outcome of future elections.

Hawkins specifically used a proprietary metric created by NCEC called the Democratic Performance Index (the "DPI"), which indicates how a generic Democratic candidate would likely perform in a particular district. As Hawkins explained, the DPI "is an average of how statewide candidates perform over time in competitive elections" that is "weighted differently for different election years," and which "take[s] into account past voting history in a state or a district." Hawkins Dep. 24:12–18. NCEC also calculated separate versions of the DPI specific to federal and state races — with the federal DPI "only us[ing] federal races" and the state DPI "only us[ing] state races" — to better account for "ticket splitting." *Id.* at 25.

Hawkins used the DPI to meet the dual "goals" given to NCEC — namely, to draw a map that would maximize "incumbent protection" for the Democrats currently representing Maryland districts in Congress and that would "chang[e] the make-up of Maryland's U.S. House delegation from six Democrats and two Republicans to seven Democrats and one Republican." Hawkins Dep. 40–42; *see also id.* at 47–49. With

respect to this 7 to 1 goal, Hawkins' efforts focused on redrawing the Sixth District's lines to increase its federal DPI, which Hawkins calculated under the pre-existing map as standing at 37.4%, indicating low Democratic performance and correspondingly strong Republican performance. Over the course of working with Maryland's Democratic House Delegation and their staff, Hawkins prepared several different draft maps under which the Sixth District would have a 51% federal DPI. In preparing these maps, Hawkins considered neither "any measure of compactness," *id.* at 126:12–13, nor whether "there was a community of interest related to the I-270 corridor," *id.* at 128:19–20. Rather, "[t]he intent was to see if there was a way to get another Democratic district in the state." *Id.* at 230:19–20.

Maps were also proposed by third-party entities, but those maps resulted in a far smaller federal DPI for the Sixth District. For example, a map proposed by the Maryland Legislative Black Caucus would have resulted in a federal DPI of 39% for the Sixth District, ECF No. 177-34, a proposal a senior congressional staffer worried would be "a recipe for 5–3, not 7–1," ECF No. 177-36. Needless to say, these proposals did not influence the maps submitted by Hawkins to the Democratic House Delegation.

Ultimately, Maryland's Democratic members of the U.S. House Delegation proposed and forwarded to the state Democratic leadership at least two maps prepared by Hawkins. The shape of the Sixth District in one of these maps, which had a DPI of 51.36%, was

very similar to the plan that was ultimately adopted. *See* Decl. of Dr. Michael McDonald at 4 & fig. 5 (ECF No. 191-5).

After Maryland's U.S. House Democrats submitted their proposals, further work was done by a group of senior staffers of O'Malley, Maryland Senate President Thomas Miller, and Maryland House Speaker Michael Busch. These senior staffers were equipped with a laptop loaded with the Maptitude software; "party registration data and voter turnout data," including at the census block level, the smallest geographic unit used by the U.S. Census Bureau; and a "data file[ ] that contained Democratic Performance Index information at the precinct level," the smallest geographic unit in Maryland (averaging around 3,000 people) at which election results are reported. Weissman Decl. ¶¶ 3–5 (ECF No. 186-11). These state Democratic officials thus continued to use the DPI — as well as other information about how local groups of citizens had previously voted and the political party with which they were affiliated — to finalize a map for the Advisory Committee.

The Advisory Committee publicly released a proposed congressional redistricting map on October 4, 2011, with the Committee's lone Republican casting the sole dissenting vote against the plan. Joint Stipulations ¶ 32. The Committee's map had a federal DPI of 53% in the Sixth District, which was greeted as "good news" by the man who was widely expected to be the Democratic nominee to represent the newly

redrawn Sixth District in the upcoming 2012 election. ECF No. 177-25.

Members and staff of the Advisory Committee briefed a joint session of the state House and Senate Democratic Caucuses about their recommended congressional plan on October 3, 2011. Joint Stipulations ¶ 35. Talking points prepared for Senate President Miller's introductory remarks encouraged him to emphasize that "[e]ven though the map isn't pretty, it accomplishes a few important goals," including "creat[ing] an opportunity for Montgomery County to control two congressional districts"; "preserv[ing] all six incumbent Democrats in 'safe' districts," none of which would have "less than 58% Democratic performance"; and "giv[ing] Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett." ECF No. 177-23. The talking points continued, "In the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity." *Id.*

Following Senate President Miller's remarks, Chairwoman Jeanne Hitchcock delivered a PowerPoint presentation that stated that the Sixth and Eighth Districts had been "[c]onfigured to reflect the North-South connections between Montgomery County, the I-270 Corridor, and western portions of the State." Joint Stipulations, Ex. 6. The record suggests that those in attendance were skeptical that the I-270 corridor justified dramatically redrawing both the Sixth and the Eighth Districts. For example, immediately after Hitchcock's presentation, Democratic

Delegate Curt Anderson told a reporter, "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." Joint Stipulations ¶ 46 & Ex. 13. And, while listening to Hitchcock give a similar presentation earlier in the day, one senior congressional aide who had been intimately involved in the redistricting process wrote to another, "This is painful to watch. . . . I'm not sure I buy the themes they are selling. Hopefully they have some better ones for the public face of it." ECF No. 177-58.

On October 15, 2011, Governor O'Malley announced that he was submitting a map to the General Assembly "that was . . . substantially the same as" the Advisory Committee's proposal, Joint Stipulations ¶ 33, and two days later, on October 17, Senate President Miller introduced the Governor's proposed redistricting map as Senate Bill 1 at a special legislative session. With only minor technical amendments, Senate Bill 1 was signed into law on October 20, 2011, three days after it had been introduced. *Id.* ¶ 34; *see* Md. Code Ann., Elec. Law §§ 8-701 to -709.

"No Republican Senator or Delegate voted for Senate Bill 1 in committee or on the floor in recorded roll call votes." Joint Stipulations ¶ 36. Moreover, while the legislation was progressing rapidly through the General Assembly, numerous legislators made comments reflecting their clear understanding that the massive redrawing of the Sixth District was designed primarily to give the eventual Democratic nominee a distinct

electoral advantage over the Republican nominee. For example, one Delegate bluntly stated in a floor speech that he supported the map because it meant "more Democrats in the House of Representatives." *Id.* ¶ 44. Another Delegate stated in an October 17 interview that, "What we're doing is we are trying to get more, in terms of — currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one, with the additional Congressional district coming more out of Montgomery county and going into western Maryland that would give the Democrats more." *Id.* ¶ 47. One Democratic Senator who voted for the bill nonetheless lamented in a floor speech that partisan gerrymandering was a problem across America, adding that "it's a process where we dress up partisan and political ambition on both sides of the aisle in high principal, *but we can all tell what's really going on.*" Joint Stipulations ¶ 43(a) (emphasis added). And the only Democratic Senator to vote against the bill stated in an October 14 interview, "[W]hen you look at the way these districts are drawn, they're absolutely drawn with one thing in mind. . . . *[I]t's certainly drawn so that you can minimize the voice of the Republicans.*" ECF No. 177-41 at 16 (emphasis added).

The effect of the Sixth District's wholesale recomposition was precisely as intended. Tellingly, in October 2012, the Cook Political Report released an analysis of "all 435 newly redrawn Congressional districts in the country" using its Partisan Voter Index ("Cook PVI"), ECF No. 177-52 at 1, a well-respected

"measurement of how strongly a United States congressional district or state leans toward the Democratic or Republican Party, compared to the nation as a whole," ECF No. 177-51; *see also* Lichtman Dep. 131 (ECF No. 177-49) (testimony of State's expert witness that the Cook PVI is a "well respected" and "well regarded" metric). The Cook Report specifically examined "which districts underwent the most dramatic alterations in redistricting" and found that Maryland's Sixth District experienced the single largest redistricting swing of any district anywhere in the Nation. ECF No. 177-52 at 6–8. Specifically, before the 2011 redistricting, the Sixth District had a Cook PVI of "R+13" and a "Solid Republican" label; after redistricting, the District received a Cook PVI of "D+2" and a "Likely Democratic" label. *Id.* at 8. An academic analysis that looked at the accuracy of the Cook Report's forecasting helps unpack the significance of this swing. When the Cook Report has rated a district "Solid Republican" on the eve of a congressional election, the Republican candidate has won the race 99.7% of the time; when a district has been rated as "Likely Democratic," the Democratic candidate has won 94% of the time. *See* James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 43 Pol. Sci. & Politics 627, 628 (2010) (ECF No. 191-8).

Moreover, the Cook Report's analysis of the effect of redistricting on the Sixth District was corroborated by NCEC's own data. According to NCEC, in the 2016 congressional election cycle, "Democrats [nationwide] won only four districts where DPI was below 50

percent"; in none of those districts was the DPI below 40%, as it was in the Sixth District prior to redistricting. ECF No. 191-7. Conversely, among the 160 districts across the country with a DPI above 50%, all but 12 were won by the Democratic candidate. *Id.* Both Cook's and NCEC's data confirmed that the Democrats held a clear electoral advantage and that Republican voices had indeed been minimized.

B. Proceedings

Three Maryland citizens, acting *pro se*, commenced this action in November 2013, naming as defendants the Chair and the Administrator of the State Board of Elections and alleging that the 2011 redistricting plan violated their rights under the First Amendment and Article I, § 2, of the U.S. Constitution. A single district court judge granted the State's motion to dismiss, ***Benisek v. Mack***, 11 F. Supp. 3d 516 (D. Md. 2014), and the Fourth Circuit summarily affirmed, ***Benisek v. Mack***, 584 F. App'x 140 (4th Cir. 2014). The Supreme Court reversed, however, concluding that the plaintiffs' constitutional challenge was not "wholly insubstantial" and that therefore it had to be decided by a district court composed of three judges, as required by 28 U.S.C. § 2284. ***Shapiro v. McManus***, 136 S. Ct. 450, 456 (2015) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). In doing so, the Court observed that the theory underlying the plaintiffs' First Amendment claim had originally been suggested by Justice Kennedy in *Vieth* and was "uncontradicted by the majority in any of [the Court's] cases." *Id.*

After remand, the plaintiffs, now represented by counsel, filed a second amended complaint, adding six additional plaintiffs and refining the theory underlying their constitutional challenge. Two of the original plaintiffs later agreed to their dismissal from the action, leaving seven plaintiffs, all of whom are registered Republicans who lived in the Sixth District prior to the 2011 redistricting. Three of these plaintiffs still reside in the Sixth District, while four of them now live in the Eighth District as a result of the redistricting.

The plaintiffs' second amended complaint alleged that those responsible for the 2011 congressional map "purposefully and successfully flipped [the Sixth District] from Republican to Democratic control by strategically moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations." Second Am. Compl. ¶ 1. They alleged that "[t]he drafters of the Plan focused predominantly on the voting histories and political-party affiliations of the citizens of the State in deciding how to" redraw the Sixth District's lines and that they "did so with the clear purpose . . . of diluting the votes of Republican voters." *Id.* ¶ 6. They alleged further that the plan achieved its intended effect, imposing a significant burden on the former Sixth District's Republican voters and preventing them in 2012 and 2014 "from continuing to elect a Republican representative . . . , as they had in the prior ten congressional elections." *Id.* ¶ 7(b). And they maintained that "the State cannot justify the cracking of the [Sixth] District by reference to geography or compliance with legitimate redistricting criteria." *Id.* ¶ 7(c).

Based on these allegations, the plaintiffs claimed in essence that the plan's redrawing of the Sixth District's boundaries constituted unlawful retaliation in violation of their rights under the First Amendment.

In an opinion issued August 24, 2016, this three-judge court denied the State's motion to dismiss, concluding that the plaintiffs had adequately alleged a justiciable claim for relief. *Shapiro*, 203 F. Supp. 3d at 586, 600. We held that to succeed on their claim, the plaintiffs would have to prove three elements: *first*, "that those responsible for the map redrew the lines of [their] district with the *specific intent* to impose a burden on [them] and similarly situated citizens because of how they voted or the political party with which they were affiliated"; *second*, "that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect"; and *third*, "that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." *Id.* at 596–97.

Following the completion of extensive discovery, the plaintiffs filed a motion for a preliminary injunction and requested, pursuant to Rule 65(a)(2), that the trial on the merits be advanced and consolidated with a hearing on their motion. Briefing on the plaintiffs' motion for a preliminary injunction was completed, with the parties presenting a robust evidentiary record of more than 80 exhibits, and on July 14, 2017, we conducted a half-day hearing on the motion.

II

This court is clearly of one mind that, as a general matter, partisan gerrymandering is noxious to our form of democracy. And if we read correctly the public sentiment, that view is widely shared. Indeed, the Supreme Court, with no disagreement from any Justice, has concluded that severe partisan gerrymandering is incompatible with democratic principles. Yet, Judge Bredar, writing only for himself, expresses doubts as to whether claims of partisan gerrymandering are justiciable.

To be sure, drawing the lines of congressional districts is a political process. But the Supreme Court has repeatedly recognized that the political nature of redistricting does not immunize the process from claims that are based on violations of particular provisions of the Constitution. Thus, in *Baker v. Carr*, 369 U.S. 186 (1962), the Court recognized that when redistricting denies citizens equal protection, the issue is justiciable because "the equal protection clause is not diminished by the fact that the discrimination relates to political rights," *id.* at 210 (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)). Similarly, in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court concluded that the political nature of redistricting does not "immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*. . . . The right to vote is too important in our free society to be stripped of judicial

protection," *id.* at 6–7. In a similar vein, the Court has found justiciable an equal protection redistricting claim where "race was *the predominant factor motivating* the legislature's decision to place a significant number of voters within or without a particular district." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (emphasis added) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). And in circumstances more analogous to those presented in this case, the Court in *Davis v. Bandemer*, 478 U.S. 109, 113, 118–27 (1986), held that a claim alleging an unconstitutional dilution of votes of one political party's members was justiciable.

While claims alleging violations of individual constitutional rights are justiciable and have been so since *Marbury v. Madison*, the Court has been unable to find a standard by which to conclude that suspect districts, although equal in population, violate the Equal Protection Clause based on extreme partisanship. *See Vieth*, 541 U.S. at 281–301. Even so, five Justices in *Vieth* concluded that the issue remained justiciable. Moreover, Justice Kennedy, canvassing the Court's decisions, appropriately recognized that claims asserting other constitutional rights, such as a violation of the First Amendment, could be reviewable. As he stated:

> First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan

> gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

Id. at 314 (Kennedy, J., concurring in the judgment). He went on to point out that "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation." *Id.* at 315. Indeed, in this very case, a unanimous Supreme Court expressly invited our consideration of the First Amendment theory articulated by Justice Kennedy, noting that the theory remains "uncontradicted by the majority in any of our cases." *Shapiro*, 136 S. Ct. at 456. And we concluded, from a fuller review of the Supreme Court's First Amendment jurisprudence, that a First Amendment theory is viable and justiciable. *See Shapiro*, 203 F. Supp. 3d at 594–97.

To begin, it is "axiomatic" that the government violates the First Amendment when it regulates speech "based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). As the Court noted, while restrictions based on content presumptively offend the First Amendment, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is *all the more blatant.*" *Id.* at 829 (emphasis added). As a result, "[t]he government must abstain from regulating speech when the specific motivating ideology or the

opinion or perspective of the speaker is the rationale for the restriction." *Id.* Moreover, viewpoint discrimination is no more constitutional when the offending restriction does not explicitly mention any individual viewpoint. Rather, facially neutral restrictions are nonetheless subject to strict scrutiny when they "were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Moreover, the government may not suppress one viewpoint even in spheres of activity where it can lawfully restrict the categories of speech permitted and the time, place, and manner in which it is conveyed. *Rosenberger*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics"); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–49 (1983). So, for example, while the government may lawfully exercise significant control over its employees, it may not fire someone solely because he belongs to a disfavored political party, as this would amount to blatant "government discrimination based on the viewpoint of one's speech or one's political affiliations." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 683 (1996); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–70 (1968) (barring discharge of public-school teacher for writing letter critical of school board).

Indeed, even where the government is allowed, or even required, to *consider* the viewpoint of expression that it regulates, this does not give it permission to *intentionally advance* one viewpoint over the other. Thus, in *Board of Education v. Pico*, 457 U.S. 853 (1982), the Court evaluated a First Amendment challenge to a school board's removal of certain library books from school libraries. The Court recognized that, although the local school board "possess[ed] significant discretion to determine the content of their school libraries," its discretion could "not be exercised in a narrowly partisan or political manner." *Id.* at 870. As the Court observed, "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books." *Id.* at 870–71.

In cases where some regulation of expression is inevitable, such as in *Pico*, assessing a constitutional claim "depends upon *the motivation* behind [the government's] actions." *Pico*, 457 U.S. at 871 (emphasis added). In assessing the school board's removal of books in that case, the Court explained, "If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." *Id.* And the Court defined "decisive factor" to mean "a 'substantial factor' in the absence of which the opposite decision would have been reached." *Id.* n. 22 (citing *Mt. Healthy City*

Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

Given these stringent limitations on the government's ability to advance ideological motives by regulating speech, it would be strange indeed if a State's administration of elections were not similarly limited. In fact, the Court has noted specifically that "in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Thus, because an election campaign is "an effective platform for the expression of views on the issues of the day," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), the Court has deemed justiciable challenges to laws that threaten "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *id.* at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). Similarly, while a State may constitutionally choose locations for polling places, even though some voters may be more inconvenienced by a location than others, *see Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016), the Constitution would obviously not permit the State to locate a polling place specifically to make it more difficult for voters of a particular party to vote.

Against the backdrop of this First Amendment jurisprudence, the plaintiffs' First Amendment claim is readily justiciable. We previously concluded that plaintiffs stated a claim in alleging that the defendants drew district lines in order to dilute and thus diminish

the effectiveness of their expression. The allegation that district lines were drawn *with the intent* to suppress the effectiveness of one political party's voters is essentially no different from the familiar claims of adverse employment action due to protected political speech, *see, e.g.*, *Mt. Healthy*, 429 U.S. at 283–84, or claims that a government has taken an otherwise permissible action with the impermissible motive of silencing one side of a political debate, *see, e.g.*, *Pico*, 457 U.S. at 871.

Moreover, judicial abdication from partisan gerrymandering cases, as advocated by Judge Bredar, would have the most troubling consequences.* If there were

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* Judge Bredar protests that it "is incorrect" to state that he concludes that partisan gerrymandering claims are not justiciable. *Ante* at 12. Yet he expresaly relies on what he considers to be the plaintiffs' failure to establish justiciability as a basis for denying their motion for a preliminary injunction. *Ante* at 13–14; *see also ante* at 2.

The standing law is that partisan gerrymandering claims *are justiciable*. *See Bandemer*, 478 U.S. at 113. To be sure, various Supreme Court Justices continue to debate the question, but they have not held otherwise. Judge Bredar relies on comments by Justices who were not speaking for the Court to conclude that justiciability has been cast into doubt. And he further speculates that any rule of justiciability previously recognized may be changed in *Gill v. Whitford*, No. 16-1161, now pending before the Court. Lower courts are admonished, however, to follow the Supreme Court's existing law until the Court changes it and not to speculate on changes. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality"); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet

no limits on the government's ability to draw district lines for political purposes, a state might well abandon geographical districts altogether so as to minimize the disfavored party's effectiveness. In Maryland, where roughly 60% of the voters are Democrats and 40% Republicans, the Democrats could create eight safe congressional districts by assigning to each district six Democrats for every four Republicans, regardless of the voters' geographical location. In a similar vein, a Republican government faced with these same voters could create a map in which two districts consisted entirely of Democrats, leaving six that would be 53% Republican. Such a paradigm would be strange by any standard. A congressman elected in such a system could have constituents in Baltimore City, others in Garrett County, and yet others in the suburbs of Washington, D.C., preventing him from representing any of his constituents effectively. Similarly, members of a single household could be assigned to different congressional districts, and neighbors would be denied the ability to mobilize politically. Such partisan gerrymandering, at its extreme, would disrupt the "very essence of districting," which "is to produce a different . . . result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

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appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

Drawing on traditional First Amendment jurisprudence, which includes "well-established standards for evaluating ordinary First Amendment retaliation claims," *Shapiro*, 203 F. Supp. 3d at 596, we thus previously held that a plaintiff states a claim for unconstitutional gerrymandering when he demonstrates that (1) "those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated," (2) "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect," and (3) "the mapmakers' intent to burden a particular group of voters by reason of their views" was a but-for cause of the "adverse impact." *Id.* at 596–97. And that is the standard that we must now apply.

III

To grant a preliminary injunction, we must conclude that the plaintiffs are likely to succeed on the merits; that without the injunction, they are likely to suffer irreparable harm; that the balance of equities favors them; and that the injunction would be in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In this case, the only issue seriously disputed is whether the plaintiffs are likely to succeed on the merits. I address the remaining requirements in Part IV.

Under the standard established in this case for a First Amendment claim, the plaintiffs must show (1) intent, (2) concrete adverse effect, and (3) causation. *Shapiro*, 203 F. Supp. 3d at 596–97. If the plaintiff makes a sufficient showing of these requirements, "the State can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest." *Id.* at 597.

First, with respect to the mapmakers' intent, the process described in the record admits of no doubt. Maryland Democratic officials worked to establish the congressional district boundaries in 2011 with a narrow focus on diluting the vote of Republicans in the Sixth District, so as to ensure the election of an additional Democratic representative. Governor O'Malley, who was responsible for the redistricting process, asked Congressman Hoyer to begin the redistricting effort, and Hoyer retained NCEC to draw up district maps that protected Democratic incumbents and flipped the Sixth District from Republican to Democrat. Hawkins, an NCEC analyst, prepared district maps using NCEC's proprietary DPI metric to assess the likelihood that a district would elect a Democratic candidate. He homed in on maps using data that predicted a Democratic victory in the Sixth District, unlike maps submitted by third parties, which had sub-50% DPI values for the Sixth District. Hawkins submitted several maps, each with a higher DPI in the Sixth District, to the Democratic members of Maryland's congressional delegation. The delegation, in turn, culled NCEC's proposed maps down to a handful

where the DPI for the District was approximately 51% and submitted those to the Advisory Committee. The Advisory Committee's staffers then used those maps, the DPI information, and their data on party registration and voter turnout to finalize a map with a 53% DPI for the Sixth District, which the General Assembly thereafter adopted.

The Advisory Committee's reliance on the DPI was essential to satisfying the Committee's intent to flip the Sixth District from safely Republican to securely Democratic. Notes prepared for Senate President Miller's remarks to the state House and Senate Democratic Caucuses about the redistricting plan emphasized that the map "create[d] an opportunity for Montgomery County to control two congressional districts"; "preserve[d] all six incumbent Democrats in 'safe' districts," none of which would have "less than 58% [DPI]"; and "g[ave] Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett." ECF No. 177-23. Governor O'Malley admitted that his Advisory Committee sought to "create a district" that "would be more likely to elect a Democrat than a Republican." O'Malley Dep. 82:16–18; *see also id.* at 27:12–15 (describing aim of "put[ting] more Democrats and Independents into the Sixth District" to ensure "the election of another Democrat"). Senate Majority Leader Garagiola admitted that "one of the purposes[] [was] to make the Sixth Congressional District have 53 percent Democratic performance." Garagiola Dep. 27:4–9 (ECF No. 177-24). These sorts of statements, particularly by delegates

and state senators during the General Assembly's abbreviated consideration of the proposed map, are legion. *See, e.g.*, Joint Stipulations ¶¶ 40–51.

The State's argument that its officials intended only "to allow Democrats to have an equally effective voice in the election of a representative" in the Sixth District — an intent that it argues "cannot be equated with an intent to burden [Republicans'] representational rights" — is hollow. Defs' Memo. at 31. Even if the intent to make one party "more competitive" were constitutionally permissible, the record shows something materially different. Members of the Advisory Committee, with the help of NCEC, worked to craft a map that would specifically transform the Sixth District into one that would *predictably* — that is, by a 94% chance — elect a Democrat by removing Republicans from the District and adding Democrats in their place.

More fundamentally, the State's argument misunderstands the law. If the government uses partisan registration and voting data purposefully to draw a district that disfavors one party, it cannot escape liability by recharacterizing its actions as intended to favor the other party. The First Amendment does not distinguish between these intents. A school board, for example, cannot manipulate its stock of library books for "narrowly partisan" reasons, whether its conduct is described as removing all books written by Republicans or as constructing a library full of books written by Democrats. *Pico*, 457 U.S. at 870–71. Where the government singles out a person or class of persons based

on their political affiliation and voting and acts so as to hamper their ability to effectively engage in future expression, it has run afoul of the First Amendment no matter how it characterizes its intent.

The State also argues that its officials did not act with impermissible intent because they did not target *specific voters* based on their individual party affiliation or voting history. This argument, too, is based on a misunderstanding of First Amendment jurisprudence. Here, the plaintiffs have shown that they were targeted for disfavored treatment because of a shared marker of political belief — their Republican party affiliation. The fact that the State moved Republican voters out of the Sixth District *en masse*, based on precinct-level data, and did not examine each voter's history with care before taking that punitive action does not make its action less culpable under the First Amendment. *Cf. Miller*, 515 U.S. at 920 (condemning State's targeting of areas with "dense majority-black population" for inclusion in district); *Sweezy v. Wyman*, 354 U.S. 234, 250 (1957) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents"). If anything, the First Amendment is *more* skeptical where the government uses peoples' nominal party alignment as a proxy for their actual expression. *See, e.g.*, *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).

Thus, because State officials have admitted that they intended "to create a district where the people would be more likely to elect a Democrat than a Republican" and that they removed likely Republican

voters from the Sixth District specifically to achieve that aim, the plaintiffs have established that the State acted with constitutionally impermissible intent.

Second, with respect to the adverse effect element, the plaintiffs have shown that the redrawn Sixth District did, in fact, burden their representational rights. At the threshold, it is important to reiterate that, under the standard set forth in our denial of the motion to dismiss, a plaintiff who has shown that the State acted with impermissible retaliatory intent need not show that the linedrawing altered the outcome of an election — though such a showing would certainly be relevant evidence of the extent of the injury. *See Shapiro*, 203 F. Supp. 3d at 598. And, contrary to the State's argument, the plaintiffs need not show that the new Sixth District was *certain* to produce a Democratic congressman. *See Kusper*, 414 U.S. at 58 (explaining that, while restriction on primary voting did not "deprive [voters] of all opportunities to associate with the political party of their choice," it was nevertheless "a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association"); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (holding that adverse employment actions not amounting to discharge may nevertheless violate the First Amendment). Rather, the plaintiffs must show only that their electoral effectiveness was meaningfully burdened — and, of course, that it was intentionally burdened for partisan reasons. That is, a voter must have experienced a "demonstrable and concrete adverse effect" on his "right to have

'an equally effective voice in the election' of a representative.'" *Shapiro*, 203 F. Supp. 3d at 598 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)); *see also Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006) ("[W]e have recognized a distinction between an adverse impact that is *actionable*, on the one hand, and a *de minimis* inconvenience, on the other").

The plaintiffs here have made such a showing. By several measures, the new Sixth District map severely disfavors Republican voters. In creating the map, the State removed over 66,000 registered Republicans from the Sixth District and added some 24,000 registered Democrats, such that Republican voters went from outnumbering Democrats 1.3 to 1 (47% of the district's registered eligible voters being Republicans and 36% Democrats) to nearly the exact inverse (44% Democrats, 33% Republicans). Joint Stipulations ¶¶ 10, 53. According to the DPI metric used by the mapmakers and the Cook PVI metric endorsed by the State's expert, Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting, and, in *absolute* terms, they had no real chance of doing so. Indeed, the Cook report deemed the district's swing — from "Solid Republican" (R+13) to "Likely Democratic" (D+2) — the largest of any district in the country. ECF No. 177-52 at 6–8. And, historically, "Likely Democratic" districts elect a Democrat 94% of the time. *See* Campbell, *supra*, at 628.

Moreover, while the State's linedrawing need not change the outcome of an election to be culpable, the

fact that a Democratic candidate was elected in the three elections following the 2011 redistricting supports the fact that the Republican voters have suffered constitutional injury. In other words, the Democratic officials who drew the map achieved what they aimed to do — to make Republican voters in the Sixth District less effective.

The State argues that the plaintiffs have not adequately shown that the new Sixth District map actually "chilled" their protected expression. Defs' Memo. at 38. This argument has two flaws. First, a First Amendment injury need not take the form of "chilling" or "deterring" speech. Rather, a plaintiff may claim retaliation if his expression is "adversely affected," *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000), and surely the government's reduction of the *effectiveness* of expression qualifies as an adverse effect. Second, there is no requirement an *individual* plaintiff show that the government's action has specifically deterred him from engaging in protected conduct. The Supreme Court's patronage cases, which are rooted in retaliation principles, have expressly repudiated any requirement "that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Branti v. Finkel*, 445 U.S. 507, 517 (1980). Rather, "[t]he determination of whether government conduct or speech has a chilling effect or an adverse impact is an objective one." *Balt. Sun*, 437 F.3d at 416. Thus, to evaluate whether the State's conduct caused a First Amendment injury, we assess only whether its

purposeful dilution of Republicans' electoral power would adversely affect the protected expression of a reasonable person situated similarly to the plaintiffs. *See id.*

The State's action here would impair a reasonable Republican voter's exercise of his First Amendment rights. Republicans in the Sixth District faced a severe political disadvantage after the 2011 redistricting. This itself is a constitutional injury. Moreover, it is not hard to see how the dilution of Republican voters' effectiveness could deter reasonable voters from full participation in the political process. A committed Republican voter who finds himself in the minority may well lose interest in voting or in supporting candidates for a legislative office that, realistically, they are unlikely to fill. A different Republican voter in the new Sixth District might choose to abandon his party, finding his energy better spent supporting moderate candidates in Democratic primaries. *See Rutan*, 497 U.S. at 73 ("[E]mployees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience"); *Elrod v. Burns*, 427 U.S. 347, 355 (1976) ("[A] pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs"). Here, there was direct evidence of chilled expression, as participation in the Sixth District's Republican primaries dropped substantially between 2010 and 2014, which supports the notion that partisan manipulation deterred the robust exercise of representational rights.

There is also anecdotal evidence of Republicans not voting after the redistricting because of confusion or loss of interest. Of course, voters have no constitutional right to be successful in electing the candidate they favor, and voters regularly lose interest in politics or switch parties for reasons unrelated to gerrymandering. But this does not answer the relevant First Amendment question. In short, the purposeful reduction of one party's effectiveness may well chill the protected expression of that party's voters, even if no individual plaintiff establishes, as a factual matter, that *he* was so chilled.

Finally, as to causation, the plaintiffs have established that, absent the State's retaliatory intent, the Sixth District lines would not have been drawn to dilute the electoral power of Republican voters to the same extent. The framework governing our inquiry into causation is set forth in *Mt. Healthy*, 429 U.S. 274. Specifically, once the plaintiffs have established that the government's constitutionally impermissible intent "was a 'motivating factor' in [its] decision," the burden shifts to the State to show that, even absent the forbidden intent, "it would have reached the same decision." *Id.* at 287 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977)). In other words, assuming that the State intended to burden the plaintiffs' representational rights, we must then determine "if this intent was the decisive factor in [their] decision" to do so. *Pico*, 457 U.S. at 871; *see also Vill. of Arlington Heights*, 429 U.S. at 270 n.21 (explaining that, where "the same decision would have

resulted even had the impermissible purpose not been considered," then "there would be no justification for judicial interference with the challenged decision"). Under the *Mt. Healthy* framework, therefore, where unlawful intent *in fact* drove the State to its decision, the State cannot escape liability by "hypothesiz[ing] that it *might* have employed lawful means of achieving the same result." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 n.54 (1978) (opinion of Powell, J.) (emphasis added) (declining to allow a remand because it "would result in fictitious recasting of past conduct").

The State rejects *Mt. Healthy*'s burden-shifting framework for causation, contending that it applies only in the context of public employment. But there is simply no support for the State's cramped reading of that case. On the contrary, *Mt. Healthy* stands for a general, common-sense principle applicable in *all* retaliation-based First Amendment claims — that, where the government takes an injurious action, an injured party need not show that the government would never have taken the same action anyway. The Supreme Court has accordingly relied on the *Mt. Healthy* framework in several types of claims unrelated to public employment, and indeed in allegations of constitutionally forbidden intent beyond those related to protected expression. *See Pico*, 457 U.S. at 870, 871 n.22 (school board's removal of books from school library); *Wilkie v. Robbins*, 551 U.S. 537, 558 n.10 (2007) (Bureau of Land Management's intimidation of landowner to induce his grant of an easement); *Texas v. Lesage*, 528 U.S. 18, 20–21 (1999) (per curiam)

(university's rejection of application under race-conscious admissions program); *Vill. of Arlington Heights*, 429 U.S. at 270 n.21 (village's denial of rezoning request). The framework is no less applicable here.

As already noted, the record demonstrates that the State intended to burden the plaintiffs' representational rights, which leaves the question of whether the State has shown that, absent this intent, it would have drawn lines that similarly burdened Republican voters in the Sixth District. While it probably would be impossible for the State to show that it would have drawn the *exact same district lines* absent the impermissible intent, to satisfy its end of the burden-shifting inquiry, it would at least have to show that it would have drawn lines that similarly burdened the plaintiffs' representational rights.

Even this, however, the State cannot do. It points to two primary objectives that it claims justify the Sixth District's reconfiguration in 2011 — preventing the new First District from crossing the Chesapeake Bay and grouping residents of the I-270 corridor together in one district. But the evidence of intent in this case is overwhelming and undisputed that the State drew the lines of the Sixth District to flip the District from Republican to Democratic control, and it is implausible that consideration of these other objectives would have led to a map that similarly burdened Republican voters. Again, in tasking Hawkins with drawing a map, Democratic officials provided him with only two goals — protecting Democratic incumbents and obtaining a seventh Democratic seat. Hawkins was *not*

instructed to consider whether "there was a community of interest related to the I-270 corridor." Hawkins Dep. 128:19–20. The record shows no invocation of I-270 as a justification for the shapes of the Sixth and Eighth District's until Jeanne Hitchcock's presentation of the nearly final map to the joint session of House and Senate Democratic Caucuses and, unsurprisingly, even Democratic delegates found it a flimsy justification for the dramatic reshuffling of the two districts. *See, e.g.*, Joint Stipulations ¶ 46.

The majority, in finding that the plaintiffs failed to show a likelihood of success on the causation element, commits two significant errors. First, it mischaracterizes our previous holding on the causation element to adopt a new standard that is inconsistent with First Amendment jurisprudence. Second, it applies the new standard to the facts in a confusing and inherently inconsistent manner.

The majority begins correctly by stating the causation standard from our previous holding — that the gerrymander must create a tangible, adverse impact that would not have occurred but for the unconstitutional intent of the mapmakers. *See ante* at 17. But then it leaps from this correct statement of the causation standard to its own newly created standard by requiring "proof that *but for* the gerrymander, the challenged effect (here, *the switch in political power* in the Sixth District) would not have happened." *Id.* (second emphasis added). Explaining its new standard further, the majority states that the causation element "would be satisfied *only* if [the evidence showed that]

Roscoe Bartlett would have won reelection in 2012 had the prior map remained intact." *Ante* at 18. Indeed, it expressly contemplates that voters' injury takes the form of Bartlett's loss to Delaney, "but only if that loss is attributable to gerrymandering or some other constitutionally suspect activity. If the loss is instead a consequence of voter choice, that is not an *injury*." *Id.* These arguments, however, represent a failure to understand First Amendment jurisprudence, which focuses not on who wins but on the burden imposed on First Amendment rights — here, on the right to cast an undiluted vote. In short, the majority's new First Amendment standard depends on an *election's results*, not on the adverse impact of dilution on the targeted voters. Under the applicable First Amendment framework, however, the adverse effect is *the dilution* of votes — and the corresponding burdening of expression by voters — regardless of how the election turned out.

Under the majority's standard requiring an altered *election outcome*, critical First Amendment violations could never be remedied. For instance, claims that the party in control of State government deliberately attempted to suppress political speech *before* an election or deliberately located polling places to inconvenience the other party could never be pursued under the majority's standard, because the plaintiffs would be unable to show that the election results were tipped as a result of the unconstitutional conduct. More to the point, under the majority's new standard, no redistricting map could be challenged *before* an election. Any

standard of causation that would so arbitrarily limit our ability to redress constitutional injuries must be rejected.

In applying its new standard to the facts in the record, the majority's analysis is yet more confusing. The majority accepts that the defendants here *did in fact intend* to retaliate against voters who had previously voted for Republican candidates in the Sixth District by drawing a map that moved over 66,000 Republicans from the old Sixth District and introduced some 24,000 new Democrats to diminish the Republicans' ability to express their political viewpoint. The majority also accepts, as it has to, that this map *was in fact adopted* and that, under this new map, the Republicans' voice was diminished and the Democrats *achieved unprecedented electoral success in the Sixth District*. I submit that only one conclusion can be drawn from these accepted facts — that a degree of vote dilution significant enough to place Republican voters at a concrete electoral disadvantage was caused by the conduct that the State specifically intended. Yet, somehow, the majority holds that these actions *did not cause* the retaliatory harm that the State intended. The majority somehow concludes that the State's plan was ineffective, despite its intended effect coming to pass. Such a view of causation necessarily embraces the bizarre notion that other, unnamed factors might have coincidently caused those effects. Under such reasoning, a defendant who intentionally poisons a victim's drink could not be found to cause the death because the victim *might have* died from a heart attack

anyway. Yet this is the argument that the majority embraces.

Moreover, applying a causation standard that seeks to eliminate all possible but unproved factors, however remote and speculative, is directly contrary to the causation standard that the Supreme Court has established for retaliation claims. In *Mt. Healthy*, the Court required only a showing that the constitutionally impermissible intent was *a motivating factor*, such that the State cannot escape liability by hypothesizing some remote or speculative cause. *See Mt. Healthy*, 429 U.S. at 287.

In sum, the record amply proves that the State violated the First Amendment under the standard we previously adopted in this case. Indeed, on this record, there is no way to conclude otherwise, even as a possibility. *A fortiori*, it follows that the plaintiffs have demonstrated *the likelihood* of success on the merits, as required for entering a preliminary injunction.

IV

The other three factors governing our issuance of a preliminary injunction do not require extensive discussion. Absent an injunction, the plaintiffs are likely to suffer irreparable harm. Because the State's construction of the Sixth District in 2011 likely violated the plaintiffs' First Amendment rights, the plaintiffs are experiencing ongoing constitutional injury without a new map. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts

routinely deem restrictions on fundamental voting rights irreparable injury"). Moreover, the plaintiffs seek a preliminary injunction *now* so as to have a new map in place for the 2018 congressional election cycle. We must be mindful of the fact that, "once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law." *Id.*

The balance of the equities here also favors the plaintiffs. To be sure, requiring Maryland to redraw the Sixth District's boundaries is no trivial matter. But where, as here, plaintiffs establish a strong likelihood of success on the merits and irreparable injury, they have generally shown that the equities work in their favor. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812–13 (4th Cir. 1991). And though there is no doubt that the State would have to expend resources in redrawing district lines that comply with our injunction, the fact that the State regularly creates new legislative maps so as to comply with other constitutional requirements, like "one person, one vote," suggests that the burden will not be unduly onerous. Indeed, our discussion of the merits reveals the ease and precision with which lines can be drawn using mapmaking software, and we are confident that the State, with the aid of such software, will have little trouble devising an alternative map that complies with the law. The plaintiffs in fact have offered an alternative map in this case where only the line between the Sixth and Eighth Districts had to be redrawn.

Finally, it is obvious that an injunction here will serve the public interest. An injunction will not only redress a serious, ongoing constitutional injury, but will also enable the plaintiffs and those similarly situated to them — a large portion of Maryland voters — to more fully participate in congressional elections.

In sum, this fulsome record overwhelmingly shows the plaintiffs' satisfaction of our First Amendment standard, and the ongoing harm can only be rectified by the entry of an injunction. I would therefore grant the plaintiffs' motion in full.

V

If the plaintiffs were to appeal the denial of their motion for an injunction, *see* 28 U.S.C. § 1253, I would have no objection to the entry of a stay. Failing that, however, the mere pendency of *Gill v. Whitford*, No. 16-1161, in the Supreme Court does not justify delaying a final decision in this case alleging a serious breach of an important constitutional right. The nature of the claim in *Gill*, as well as the facts supporting the claim, is materially different from the nature of the claim before us. *Gill* centers on an Equal Protection claim relating to statewide redistricting, while this case involves a First Amendment claim arising from the line-drawing of a single district. Accordingly, at this juncture, I do not join the majority's *sua sponte* entry of a stay.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN M. SHAPIRO, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No.: 1:13-cv-03233-JKB
DAVID J. MCMANUS, JR., *et al.*,	*	
Defendants.	*	

COMMON CAUSE; THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW; THE CAMPAIGN LEGAL CENTER, INC.,

Amici Supporting Plaintiffs.

Michael B. Kimberly and Paul Whitfield Hughes, MAYER BROWN LLP, Washington, D.C., for plaintiffs.

Jennifer L. Katz and Jeffrey Lewis Darsie, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for defendants.

Benjamin W. Thorpe, Emmet J. Bondurant, BONDURANT MIXSON AND ELMORE LLP, Atlanta, Georgia, Gregory L. Diskant, Susan Millenky, PATTERSON BELKNAP WEBB AND TYLER LLP, New York, New York, and Michael A. Pretl, Riverton, Maryland, for Amicus Common Cause. Charles E. Davidow, Washington, D.C., Pietro Signoracci, Robert A. Atkins, New York, New York, PAUL WEISS RIFKIND WHARTON

AND GARRISON LLP, and Michael Li, New York, New York, for Amicus The Brennan Center for Justice at N.Y.U. School of Law. Paul March Smith, JENNER AND BLOCK LLP, Washington, D.C., for Amicus The Campaign Legal Center, Inc.

Filed: August 24, 2016

Before Niemeyer, Circuit Judge, and Bredar and Russell, District Judges.

Judge Niemeyer wrote the opinion in which Judge Russell joined. Judge Bredar wrote a dissenting opinion.

NIEMEYER, Circuit Judge:

The plaintiffs, who are Maryland voters and registered Republicans, challenge the constitutionality of Maryland's 2011 congressional redistricting law under the First Amendment and Article I, §§ 2 and 4, of the U.S. Constitution. They allege in their second amended complaint (1) that the State drew the lines of Maryland's Sixth Congressional District with the specific intent to punish and retaliate against them and similarly situated voters by reason of how they voted and their political party registration; (2) that the State, in furtherance of this purpose, drew the Sixth District's lines in such a manner as to dilute their vote and burden their political expression; and (3) that the State succeeded in its efforts, inflicting a tangible and concrete adverse effect. The question presented is whether the plaintiffs' complaint states a justiciable claim that survives the State's motion to dismiss under Federal

Rule of Civil Procedure 12(b)(6). We conclude that it does, recognizing, as the Supreme Court stated in remanding this case to this three-judge court, that the plaintiffs' "legal theory [is] . . . uncontradicted by the majority in any of [the Court's] cases," *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015), and that their complaint adequately employs First Amendment jurisprudence to state a plausible claim for relief. Accordingly, we deny the State's motion to dismiss.

I

A

At this stage, we take the factual allegations of the plaintiffs' complaint as true.

Based on the results of the 2010 census, Maryland was entitled to eight seats in the U.S. House of Representatives, the same number it had been allotted since the 1960 census. Although Maryland's population increased by 9% from 2000 to 2010, its population growth was not evenly distributed throughout the State, necessitating redistricting to ensure districts of equal population. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (recognizing that because "States must draw congressional districts with populations as close to perfect equality as possible," States "must regularly reapportion districts to prevent malapportionment").

On July 4, 2011, Governor Martin O'Malley, a Democrat, appointed five individuals to the Governor's Redistricting Advisory Committee: (1) Jeanne Hitchcock,

Maryland's Secretary of Appointments and a former Deputy Mayor of Baltimore, a Democrat; (2) State Senate President Thomas V. Mike Miller, Jr., a Democrat; (3) House of Delegates Speaker Michael E. Busch, a Democrat; (4) Richard Stewart, a businessman who chaired Governor O'Malley's reelection campaign for Prince George's County, a Democrat; and (5) James J. King, a businessman who had previously served one term in the Maryland House of Delegates, a Republican.

The Advisory Committee was charged with the task of drafting a redistricting plan and proposing a map for the State's eight congressional districts in light of the 2010 census results. To that end, it held 12 public meetings across the State between July 23 and September 12, 2011, receiving more than 350 comments from members of the public. The plaintiffs allege, however, that the Advisory Committee conducted its actual "deliberations and calculations entirely behind closed doors." Second Am. Compl. ¶ 45. When drawing its redistricting map, the Advisory Committee had access to the Maryland Board of Elections' statistical data, which provided "highly detailed geographic information about voter registration, party affiliation, and voter turnout across the State," including "voter registration by precinct, election day turnout by precinct and party, party share of vote by voting category, and voter consistency." *Id.* ¶¶ 46–47.

The Advisory Committee completed its map on October 4, 2011, with King, the Committee's lone Republican, casting the sole dissenting vote, and presented it

to the Governor. After posting the map online and receiving additional comments from the public, the Governor announced on October 15 that he would submit to the legislature a plan that was "substantially similar" to the Advisory Committee's proposal. Two days later, on October 17, the Governor's proposed redistricting map was introduced as Senate Bill ("S.B.") 1 at an emergency legislative session. That same day, the Senate Committee on Reapportionment and Redistricting, along with the House Rules Committee, held a joint hearing on S.B. 1 before voting to approve the bill. After adopting minor technical amendments, the Senate passed the bill the next day, October 18, sending it to the House of Delegates, which, after making additional technical amendments, passed it on October 19. The Senate concurred in the House's technical amendments, and the Governor signed S.B. 1 into law on October 20, 2011, three days after it had been introduced. *See* Md. Code Ann., Elec. Law §§ 8-701 to -709.

The enacted State Plan created eight congressional districts that were mathematically equal in population—seven of the districts having an adjusted population of 721,529 and the eighth having an adjusted population of 721,528. The changes effected by the State Plan, however, were far more extensive than those needed to achieve population equality. Indeed, while "six of the eight existing congressional districts remained within 3% of the ideal size of 721,529 people[,] . . . the Plan shuffled nearly one-in-three Marylanders from one district to another, scrambling the

representation of 1.6 million people." Second Am. Compl. ¶ 61.

The reshuffling of Maryland's population was particularly extensive with respect to Maryland's Sixth Congressional District. Historically, the Sixth District included western Maryland and much of north-central Maryland. In the years following the Supreme Court's 1964 holding in *Wesberry v. Sanders*, 376 U.S. 1 (1964), that States must conduct regular redistricting to ensure districts of equal population, Maryland adopted a series of five maps that were used in the 23 congressional elections held from 1966 through 2010. Under those maps, the Sixth District always included the State's five most northwestern counties in their entirety: Garrett, Allegany, Washington, Frederick, and Carroll Counties. Over the years, the Sixth District also included various portions of Baltimore, Howard, Montgomery, and Harford Counties to achieve the appropriate population count. But the identifiable core, consisting of the five northwestern counties, stayed constant, constituting not only a majority of the Sixth District's territory but also most of its population. Specifically, after the State revised its district lines in 1991 using the data from the 1990 census, 83% of the Sixth District's population lived in the five northwestern counties, and that number rose to 88% under the State's 2002 Redistricting Plan.

The 2010 census showed that, compared to the ideal district population of 721,529 residents, the Sixth District had 10,186 extra residents, a variation of only 1.4%. Yet, while the census data would have required

only a small adjustment to remove some 10,000 residents from one of the counties along the District's eastern edge, but not from the five northwestern counties, the State completely reshuffled the Sixth District. It moved 360,000 residents out of the Sixth District—virtually one-half of its population—and then added to the District 350,000 residents from Montgomery County, a Democratic stronghold that includes Washington, D.C. suburbs. The plaintiffs allege that this wholesale shifting and transfer was done not "by reference to geography or compliance with legitimate redistricting criteria," Second Am. Compl. ¶ 7(c), but rather to dilute the Republican voters' voice in the next election. The complaint alleges further that "a net total of over 65,000 registered Republican voters" were transferred from the Sixth District and "a net total of over 30,000 Democratic voters" were imported into the District, for a swing of some 95,000 voters. *Id.* ¶ 4. Moreover, although Frederick County had been included in the Sixth District continuously since 1872, the redistricting split the County's population roughly in half between the Sixth and Eighth Districts. Similarly, while Carroll County had been included in the Sixth District since 1966, the redistricting removed it from the Sixth District entirely and split its population between the Eighth and First Districts.

The plaintiffs' complaint alleges that the major reshuffling of the Sixth District's population directly affected the District's political complexion. Historically, the Sixth District was reliably Republican. Indeed, "[i]n the 70 years between January 1943 and January

2013, the [D]istrict was represented in Congress by members of the Republican Party in four out of every five years." Second Am. Compl. ¶ 78. In the 2010 election, Representative Roscoe Bartlett, the Republican candidate who had represented the Sixth District in Congress since 1993, won reelection by a margin of 28 percentage points. But because the areas removed from the Sixth District were predominantly Republican while the area added was predominantly Democratic, the parties' respective shares of the District's registered voters roughly reversed so that, at the time of the 2012 general election, 33% of the new Sixth District's registered voters were registered as Republicans, while 44% were registered as Democrats. In that election, Democratic candidate John Delaney, a newcomer to politics, defeated Representative Bartlett by 21 percentage points, with "the long-time Congressman's share of the vote dropp[ing] from 61.45% to 37.9% in a single election cycle." *Id.* ¶ 86. Delaney won reelection in 2014.

Maryland's 2011 Redistricting Plan also affected the contours of other districts, most particularly Maryland's Eighth District. That district had previously included most of the portion of Montgomery County that was reassigned to the Sixth District, and it also absorbed many of the citizens of Frederick and Carroll Counties who were removed from the Sixth District. After redistricting, the Eighth District's proportion of registered Republicans rose significantly, but registered Democrats continued to outnumber registered Republicans by a sizeable margin. Specifically, prior to

redistricting, registered Democrats outnumbered registered Republicans in the Eighth District by three to one; after redistricting, the ratio was roughly two to one. After redistricting, Representative Chris Van Hollen, a Democrat, continued to win reelection to represent the Eighth District after redistricting.

B

Three Maryland citizens, acting *pro se*, commenced this action in November 2013, naming as defendants the Chair and the Administrator of the State Board of Elections and alleging that the 2011 Redistricting Plan violated their rights under the First Amendment and Article I, § 2, of the U.S. Constitution. A single district court judge granted the State's motion to dismiss, *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014), and the Fourth Circuit Court of Appeals summarily affirmed, *Benisek*, 584 F. App'x. 140 (4th Cir. 2014). The Supreme Court, however, reversed, concluding that the plaintiffs' constitutional challenge was not "wholly insubstantial" and that therefore it had to be decided by a district court composed of three judges, as required by 28 U.S.C. § 2284. *See Shapiro*, 136 S. Ct. at 456. In doing so, the Court recognized that the theory underlying the plaintiffs' First Amendment claim had originally been suggested by Justice Kennedy and was "uncontradicted by the majority in any of [the Court's] cases." *Id.*

After remand, the plaintiffs, now represented by counsel, filed a second amended complaint, adding six

additional plaintiffs and refining the theory underlying their constitutional challenge to the 2011 congressional Redistricting Plan. The six new plaintiffs, as well as at least one of the original plaintiffs, are all registered Republicans who lived in the Sixth District prior to the Plan's enactment. While three of these plaintiffs still reside in the Sixth District, four of them now live in the Eighth District as a result of the Plan. The plaintiffs' complaint challenges the State's "cracking" of the Sixth District, alleging that those responsible for the 2011 Plan "purposefully and successfully flipped [the District] from Republican to Democratic control by strategically moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations." Second Am. Compl. ¶ 1. They allege that "[t]he drafters of the Plan focused predominantly on the voting histories and political-party affiliations of the citizens of the State in deciding how to" redraw the Sixth District's lines and that they "did so with the clear purpose . . . of diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." *Id.* ¶ 6. They allege further that the Plan achieved its intended effect, imposing a significant burden on the former Sixth District's Republican voters by preventing them in 2012 and 2014 "from continuing to elect a Republican representative . . . , as they had in the prior ten congressional elections." *Id.* ¶ 7(b). And they maintain that "the State cannot justify the cracking of the [Sixth] District by reference to geography or compliance with legitimate redistricting criteria." *Id.* ¶ 7(c). Based on these allegations, they claim that the Plan's redrawing

of the Sixth District's boundaries violated their rights under the First Amendment and §§ 2 and 4 of Article I of the U.S. Constitution.

The State again filed a motion to dismiss the complaint, arguing that the plaintiffs' claims are nonjusticiable because the plaintiffs "fail[ed] to set forth a discernable, manageable standard that would permit this Court to adjudicate their claims" under either the First Amendment or Article I. The State accepts that "unlawful political gerrymandering claims may be justiciable in concept" but emphasizes that the Supreme Court has yet to identify a judicially discernable and manageable standard for adjudicating such claims and has twice indicated that, in the absence of such a standard, political gerrymandering claims must be dismissed. *See League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004). The State argues further that the plaintiffs "failed to allege that the Plan imposed any actual restriction on any of their recognized First Amendment rights."

The plaintiffs contend that their complaint "offers . . . what was missing in *Vieth* and *LULAC*: a clear and objective standard for identifying a constitutionally significant burden on the plaintiffs' representational rights." Relying on Justice Kennedy's statement in his separate opinion in *Vieth* that "First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights," 541 U.S. at 314 (Kennedy, J., concurring in the judgment), they contend that the

First Amendment offers a well-settled framework for considering political gerrymandering claims. They state that the framework would require the court to determine *first*, whether "the State consider[ed] citizens' protected First Amendment conduct in deciding where to draw district lines, and did . . . so with an intent to dilute the votes of those citizens by reason of their protected conduct"; *second*, whether "the redistricting map, in actual fact, dilute[d] the votes of the citizens whose constitutionally-protected conduct was taken into account to such a degree that it imposed a concrete adverse impact"; and *third*, whether the map was "necessary as drawn to achieve some compelling state interest." When assessed against this framework, they maintain that their complaint states a justiciable claim upon which relief can be granted.

II

The U.S. Constitution gives both the States and Congress a role in setting the procedural rules by which citizens select the members of the House of Representatives. Specifically, Article I provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," U.S. Const. art. I, § 2, cl. 1, and further that "[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations," *id.* § 4, cl. 1. Article I thus "leaves with the States primary responsibility for apportionment of

their federal congressional . . . districts," *Growe v. Emison*, 507 U.S. 25 (1993), while also granting Congress the power to override the decisions made by the States. Congress currently uses this power only to require that States establish single-member districts. *See* 2 U.S.C. § 2c ("In each State entitled . . . to more than one Representative . . . , there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative").

The process of establishing and revising district lines is a "highly political task." *Growe*, 507 U.S. at 33. Indeed, "[t]he very essence of districting is to produce a different . . . result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Because the supporters of our country's two major political parties are not evenly distributed within any State, "[i]t is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area." *Id.* And those State officials charged with redistricting will of course "recognize the political consequences of drawing a district line along one street rather than another." *Id.* The practical "reality is that districting inevitably has and is intended to have substantial political consequences." *Id.*; *see also Vieth*, 541 U.S. at 285 (plurality opinion) ("The Constitution clearly contemplates districting by political entities,

see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics").

Because redistricting is quintessentially a political process that the Constitution assigns to the States and Congress, federal courts' supervision is largely limited. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (recognizing that "a controversy involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it" and that, "[i]n such a case, . . . a court lacks the authority to decide the dispute before it" (internal quotation marks and citations omitted)). For example, because "[p]olitics and political considerations are inseparable from districting and apportionment," a court cannot invalidate a map merely because its drafters took political considerations into account in some manner. *See Gaffney*, 412 U.S. at 753. Indeed, such an approach "would commit federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

Moreover, citizens have no *constitutional* right to reside in a district in which a majority of the population shares their political views and is likely to elect their preferred candidate. Nor do political groups have any right to a district map under which their candidates are likely to win seats in proportion to the party's overall level of support in the State. *See Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality opinion)

("Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be"); *see also Vieth*, 541 U.S. at 288 (plurality opinion) ("[The Constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups").

But even though the districting process is largely political in nature, State officials are nonetheless limited by specific provisions of the U.S. Constitution. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990) ("To the victor belong only those spoils that may be *constitutionally* obtained" (emphasis added)). To be sure, for many years, the Supreme Court "resisted any role in overseeing the process by which States draw legislative districts," *Evenwel*, 136 S. Ct. at 1123, wary of "enter[ing] th[e] political thicket," *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion). But this changed with the Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), where the Court held that a claim alleging that a state-legislative map violated the Equal Protection Clause by establishing districts with unequal populations was justiciable.

Building on *Baker*, the Supreme Court subsequently invalidated a State's malapportioned congressional map in *Wesberry*, holding that Article I, § 2's provision for the election of Representatives "'by the People of the several States' means that as nearly as is

practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7–8. Today, under *Wesberry* and its progeny, "States must draw congressional districts with populations as close to perfect equality as possible." *Evenwel*, 136 S. Ct. at 1124. Similarly, the Court held in *Reynolds v. Sims* that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis," 377 U.S. 533, 568 (1964), although "jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives" when drawing these districts, *Evenwel*, 136 S. Ct. at 1124. Together, *Wesberry* and *Reynolds* establish the judicially enforceable rule of "one person, one vote."

Federal courts are also authorized to ensure that the districting process remains free from constitutionally prohibited racial discrimination. Thus, a plaintiff pursuing a racial gerrymandering claim under the Equal Protection Clause states a justiciable claim when he alleges that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). By showing "that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations," *Miller*, 515 U.S. at 916, a plaintiff triggers strict scrutiny, shifting the burden to the State to "demonstrate that its districting

legislation is narrowly tailored to achieve a compelling interest," *id.* at 920.

In addition to these constitutional limitations on the redistricting process, the Supreme Court has also recognized that *political* gerrymandering—a term that has been defined as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength," *Black's Law Dictionary* 802, 1346 (10th ed. 2014)—may well violate the Equal Protection Clause. But the Court has struggled to devise a standard for adjudicating political gerrymandering claims under the Equal Protection Clause.

In *Bandemer*, the Court held that a claim alleging that a State's reapportionment of its legislative districts violated the Equal Protection Clause by diluting the votes of one political party's members *was justiciable*. 478 U.S. at 113, 118–27. In reaching this conclusion, the Court emphasized that "[t]he question here is the consistency of state action with the Federal Constitution," and that the plaintiffs' claim did not "ask the Court to enter upon policy determinations for which judicially manageable standards are lacking," since "[j]udicial standards under the Equal Protection Clause are well developed and familiar." *Id.* at 122 (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)). Moreover, six Justices agreed that a plaintiff bringing a political gerrymandering claim under the Equal Protection Clause must "prove both intentional discrimination against an identifiable political group and an

actual discriminatory effect on that group." *Id.* at 127 (plurality opinion); *id.* at 161 (Powell, J., concurring in part and dissenting in part). The *Bandemer* majority splintered, however, with respect to the contours of this standard. *Compare id.* at 127–43 (plurality opinion), *with id.* at 161–85 (Powell, J., concurring in part and dissenting in part).

The Supreme Court did not take up another political gerrymandering case for 18 years until it decided *Vieth*, and then it fractured again. In that case, the plaintiffs alleged that a State's revised map for its congressional districts "constituted a political gerrymander, in violation of Article I and the Equal Protection Clause." *Vieth*, 541 U.S. at 272 (plurality opinion). All of the Justices appeared to accept that political gerrymandering, if sufficiently extreme, would violate the Constitution, *see, e.g.*, *id.* at 292–93, but there remained a lack of consensus as to the appropriate standard for "determining when political gerrymandering has gone too far," *id.* at 296. Considering and rejecting the various standards proposed by the plaintiffs and dissenting Justices, as well as the standards proposed by the plurality and the concurrence in *Bandemer*, a four-Justice plurality in *Vieth* "conclude[d] that neither Article I, § 2, nor the Equal Protection Clause, nor . . . Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting," and therefore would have overruled *Bandemer*'s holding as to the justiciability of political gerrymandering claims. *Id.* at 305. Providing

the fifth vote for affirming the dismissal of the plaintiffs' claims, Justice Kennedy concurred in the judgment on the ground that, "in the case before us, we have no standard by which to measure the burden [that the plaintiffs] claim has been imposed on their representational rights." *Id.* at 313 (Kennedy, J., concurring in the judgment). But he and the Court's four dissenters refused to join the plurality's conclusion that political gerrymandering claims under the Equal Protection Clause and Article I are necessarily nonjusticiable, declining to "foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id.* at 306.

Justice Kennedy nonetheless agreed that the plurality had "demonstrate[d] the shortcomings of the . . . standards that [had] been considered to date." *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment). There were, accordingly, five votes in *Vieth* for rejecting six distinct, albeit related, standards:

> *First*, the test proposed by the *Bandemer* plurality, which required a showing of an intent to discriminate plus proof that a political group had been "denied its chance to effectively influence the political process," *Bandemer*, 478 U.S. at 132-33 (plurality opinion);
>
> *Second*, the standard proposed by Justice Powell's concurrence in *Bandemer*, which "focuse[d] on whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends,"

as "determined by reference to . . . criteria that have independent relevance to the fairness of redistricting," *id.* at 165 (Powell, J., concurring in part and dissenting in part);

Third, the standard proposed by the *Vieth* plaintiffs, which would have required proof that "the mapmakers acted with a predominant intent to achieve partisan advantage," as well as proof that the effect of the map was to "systematically 'pack' and 'crack' the rival party's voters" in such a way as to "thwart the plaintiffs' ability to translate a majority of votes into a majority of seats," *Vieth*, 541 U.S. at 284, 286-87 (plurality opinion) (emphasis omitted);

Fourth, Justice Stevens' proposal in his *Vieth* dissent to "apply the standard set forth in [the Court's racial gerrymandering cases] and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles," *id.* at 339 (Stevens, J., dissenting);

Fifth, a five-element prima facie test proposed by Justice Souter's *Vieth* dissent through which a plaintiff would show "that his State intentionally acted to dilute his vote, having ignored reasonable alternatives consistent with traditional districting principles" before "shift[ing] the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage," *id.* at 351 (Souter, J., dissenting); and

> *Sixth*, the standard proposed by Justice Breyer's *Vieth* dissent, which focused on whether "partisan manipulation" of district boundaries had been used "to entrench a minority in power," *id.* at 360 (Breyer, J., dissenting).

The primary focus of all of these rejected standards, however, was determining when the use of political considerations in districting is so *unfair* as to violate *the Equal Protection Clause*.

The Court addressed political gerrymandering once more in *LULAC*, but again failed to agree on the standard that should apply. The Court there declined to revisit *Bandemer*'s justiciability holding, but five Justices, although unable to join a single opinion, agreed that the plaintiffs' theory—which focused on the mid-decennial nature of the redistricting at issue—failed to "offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution." *LULAC*, 548 U.S. at 414; *id.* at 492–93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 511–12 (Scalia, J., concurring in the judgment in part and dissenting in part).

Taken together, the combined effect of *Bandemer*, *Vieth*, and *LULAC* is that, while political gerrymandering claims premised on the *Equal Protection Clause* remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge.

But the inability of the Supreme Court thus far to agree on a standard for adjudicating political gerrymandering claims brought under the Equal Protection Clause does not necessarily doom a claim that the State's abuse of political considerations in districting has violated any other constitutional provision. *See Vieth*, 541 U.S. at 294 (plurality opinion) ("It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable"). Indeed, in this very case, the Supreme Court recognized that the plaintiffs' legal theory—which is premised on the First Amendment rather than the Equal Protection Clause—was "uncontradicted by the majority in any of [its] cases." *Shapiro*, 136 S. Ct. at 456. We therefore turn to the limitations that the First Amendment may impose on a State's redistricting.

III

Like the Equal Protection Clause, the First Amendment also operates to limit the conduct of state actors. *See Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (recognizing that the Fourteenth Amendment makes the First Amendment "applicable to the states"). "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion). Similarly, "[t]he right to vote freely for the

candidate of one's choice is of the essence of a democratic society." *Reynolds*, 377 U.S. at 555.

In addition to these forms of *direct* expression, moreover, the First Amendment also works in tandem with other constitutional guarantees to protect *representational* rights. Indeed, "*[t]he right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms.*" *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (emphasis added) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968)). Expounding on the significance of this "representational right," the Supreme Court has explained:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in th[is] political process[ ]. . . . Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. *Full and effective participation by all citizens . . . requires, therefore, that each citizen have an equally effective voice in the election of [a representative]*.

Reynolds, 377 U.S. at 565 (emphasis added). Similarly, the Court in *Wesberry* recognized that Article I, § 2, of the Constitution requires "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7–8.

Thus, at the most basic level, when a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens, the practice imposes a burden on those citizens' right to "have an equally effective voice in the election" of a legislator to represent them. *Reynolds*, 377 U.S. at 565. In particular, the requirement of Article I, § 2, that one person's vote in a congressional election "is to be worth as much as another's," *Wesberry*, 376 U.S. at 7, provides the premise for recognizing vote "dilution" as a burden on citizens' representational rights, since dilution compromises the equal value requirement. The Supreme Court has already recognized this basic principle in the context of districts of unequal population. *See, e.g.*, *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 693–94 (1989) ("If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts"). Thus, while a State can dilute the value of a citizen's vote by placing him in an overpopulated district, a State can also dilute the value of his vote by placing him in a particular district because he will be outnumbered there by those who have affiliated with a rival political party. In each case, the weight of the viewpoint communicated by his vote is "debased." *Morris*, 489 U.S. at 693–94. And, because, in our political system, "voters can assert their preferences only through candidates or parties or both," *Anderson*, 460 U.S. at 787, the devaluation of a citizen's vote by

dilution implicates the representational right protected by the First Amendment and Article I, § 2.

The practice of *purposefully* diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations thus infringes this representational right. *See Vieth*, 541 U.S. at 314–15 (Kennedy, J., concurring in the judgment). It penalizes voters for expressing certain preferences, while, at the same time, rewarding other voters for expressing the opposite preferences. In this way, the practice implicates the First Amendment's well-established prohibition against retaliation, which prevents the State from indirectly impinging on the direct rights of speech and association by retaliating against citizens for their exercise. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out" (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998))); *see also Rutan*, 497 U.S. at 77–78 ("What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly"). Thus, under the First Amendment's retaliation prohibition, the government may neither penalize a citizen nor deprive him of a benefit because of his constitutionally protected speech

and conduct. *See Rutan*, 497 U.S. at 74–76; *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Accordingly, the well-established standards for evaluating ordinary First Amendment retaliation claims can also be used for evaluating claims arising in the redistricting context.

A plaintiff bringing a garden variety retaliation claim under the First Amendment must prove that the responsible official or officials were motivated by a desire to retaliate against him because of his speech or other conduct protected by the First Amendment and that their retaliatory animus caused the plaintiff's injury. *See Hartman*, 547 U.S. at 260 (recognizing that "any . . . plaintiff charging official retaliatory action . . . must prove the elements of retaliatory animus as the cause of injury").

With respect to the causation element, a retaliation claim requires proof of "but-for causation" or a showing that "the adverse action would not have been taken" but for the officials' retaliatory motive. *Hartman*, 547 U.S. at 260. For while "[i]t may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, . . . action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Id.*; *see also id.* at 256 ("Some official actions adverse to . . . a speaker might well be unexceptional if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is . . . the

but-for cause of official action offending the Constitution").

As for the injury element, the plaintiff must prove that government officials "took some action that adversely affected her First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005). The nature of the harm necessary to support a retaliation claim varies depending on the surrounding factual circumstances. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 397 (6th Cir. 1999) ("[T]he definition of adverse action is not static across contexts"). It is clear, however, that "the retaliatory acts committed by a [government official must] be more than *de minimis* or trivial," *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000), and that "[h]urt feelings or a bruised ego are not by themselves the stuff of constitutional tort," *Zherka v. Amicone*, 634 F.3d 642, 645–46 (2d Cir. 2011). Rather, some "concrete harm [must be] alleged and specified," *id.* at 646, and that harm must be sufficiently serious that it "would likely deter a person of ordinary firmness from the exercise of First Amendment rights," *Constantine*, 411 F.3d at 500 (internal quotation marks and citation omitted).

Because there is no redistricting exception to this well-established First Amendment jurisprudence, the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights thus provides a well-understood structure for claims challenging the

constitutionality of a State's redistricting legislation—a discernable and manageable standard.

When applying First Amendment jurisprudence to redistricting, we conclude that, to state a claim, the plaintiff must allege that those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated. In the context of redistricting, this burden is the *injury* that usually takes the form of *vote dilution*. But vote dilution is a matter of degree, and a *de minimis* amount of vote dilution, even if intentionally imposed, may not result in a sufficiently adverse effect on the exercise of First Amendment rights to constitute a cognizable injury. Instead, to establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. In other words, the vote dilution must make some practical difference. Finally, the plaintiff must allege *causation*—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.

When a plaintiff adequately alleges the three elements of intent, injury, and causation, as described above, he states a plausible claim that a redistricting map violates the First Amendment and Article I, § 2. Of course, as consistent with First Amendment jurisprudence, the State can still avoid liability by showing

that its redistricting legislation was narrowly tailored to achieve a compelling government interest. *See Elrod*, 427 U.S. at 362 ("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny").

This standard contains several important limitations that help ensure that courts will not needlessly intervene in what is quintessentially a political process. *First*, it does not prohibit a legislature from taking *any* political consideration into account in reshaping its electoral districts. A legislature and its mapmakers may, for example, still use data reflecting prior voting patterns to advance legitimate districting considerations, including the maintenance of "communities of interest," *LULAC*, 548 U.S. at 433 (citation omitted), and even the "protection of incumbents of all parties," *Vieth*, 541 U.S. at 284 (plurality opinion). Rather, what implicates the First Amendment's prohibition on retaliation is not the use of data reflecting citizens' voting history and party affiliation, but the use of such data for the purpose of making it harder for a particular group of voters to achieve electoral success because of the views they had previously expressed. *See Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment) ("[T]he First Amendment analysis . . . is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights").

Second, a plaintiff must rely on objective evidence to prove that, in redrawing a district's boundaries, the legislature and its mapmakers were motivated by a

specific intent to burden the supporters of a particular political party. It stands to reason "that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win." *Bandemer*, 478 U.S. at 128 (plurality opinion). But merely proving that the legislature was aware of the likely political impact of its plan and nonetheless adopted it is not sufficient to prove that the legislature was motivated by the type of intent necessary to sustain a First Amendment retaliation claim. Rather, the plaintiff must produce objective evidence, either direct or circumstantial, that the legislature specifically intended to burden the representational rights of certain citizens because of how they had voted in the past and the political party with which they had affiliated.

Third, the standard requires proof that the vote dilution brought about by the redistricting legislation was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters' right to have "an equally effective voice in the election" of a representative. *Reynolds*, 377 U.S. at 565. Not only is this requirement of a palpable and concrete harm indicated by First Amendment retaliation jurisprudence, but it also makes common sense. Legislators draw political gerrymanders for practical reasons, and it is fitting to measure the effect of the apportionment not by whether it crosses some arbitrary statistical threshold

or offends some vague notion of fairness, but by its real-world consequences—including, most notably, whether the State's intentional dilution of the weight of certain citizens' vote by reason of their views has actually altered the outcome of an election.

The State argues against the First Amendment standard, maintaining that the standard is "arbitrary in the sense that the previous district becomes the norm or baseline against which the fairness of the new district is to be measured" when, in reality, citizens' voting patterns are dynamic. But its argument fails to account for the necessary elements of a First Amendment retaliation claim. The retaliation jurisprudence does not, as the State implies, include a presumption of fairness of the status quo ante. The prior district itself may well have been drawn for partisan reasons, and the State can redraw its boundaries for any number of reasons. But it cannot do so to retaliate against one group for its past electoral success in that district.

The State also argues that "no individual has a constitutional right to vote in a district that is safe or competitive for that individual's preferred candidates, even where the district has been so in the past." While that may be true, it is also beside the point. As the Supreme Court has explained in the political patronage context,

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It*

> *may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Rutan, 497 U.S. at 72 (quoting *Perry*, 408 U.S. at 597). This basic principle applies with equal force in the redistricting context. While citizens have no right to be assigned to a district that is likely to elect a representative that shares their views, the State also may not intentionally drown out the voices of certain voters by reason of their views. And when a State is alleged to have not only intentionally but also successfully burdened "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Anderson*, 460 U.S. at 787 (quoting *Williams*, 393 U.S. at 30), by diluting their votes in a manner that has manifested in a concrete way, the allegation supports a justiciable claim under the First Amendment and Article I, § 2.

In sum, we recognize the justiciability of a claim challenging redistricting under the First Amendment and Article I, § 2, when it alleges intent, injury, and causation, as described herein.

IV

With this standard in hand, we assess the plaintiffs' second amended complaint, accepting the pleaded

facts as true, to determine whether it states a plausible claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

The complaint alleges that, prior to the 2011 redistricting, Maryland's Sixth Congressional District had been "represented for nearly 20 years by Republican Roscoe Bartlett, who won reelection in 2010 by a 28-point margin." Second Am. Compl. ¶ 78. But, according to the complaint, the State's Democratic Governor and its Democratic-controlled legislature "set out to crack the [Sixth] District . . . to prevent voters in that district from [continuing to] elect[] a Republican representative to Congress," *id.* ¶ 38, a goal openly admitted by members of the Advisory Committee and various legislators, *see id.* ¶¶ 95–100. The complaint alleges that, without the input or support of any of the State's Republican leaders, and even though only "relatively small adjustments [were] needed to accommodate population growth," *id.* ¶ 61, the State adopted a redistricting plan that radically redrew the Sixth District's lines, "removing over 360,000 residents from the mostly-Republican northern counties of the district and adding nearly 350,000 residents from predominantly Democratic and urban Montgomery County," *id.* ¶ 81. It alleges that, relying on data reflecting citizens' voting histories and party registrations, "the Plan accomplished a net transfer of over 65,000 Republican voters out of the district and over 30,000 Democratic voters into the district," *id.* ¶ 84, thereby altering the balance of power between the two major political parties. The complaint alleges further that

the mapmakers' effort was successful insofar as the Sixth District "was flipped by the Plan from Republican to Democratic control" in the 2012 congressional election; "[t]he district remained under Democratic control after the 2014 congressional election"; and the district "is nearly certain to remain [under Democratic control] in all future congressional elections under the Plan." *Id.* ¶ 4.

These factual allegations adequately state intent, injury, and causation and therefore support a plausible claim that the State's redrawing of the Sixth District's lines violated the plaintiffs' rights under the First Amendment and Article I, § 2. *First*, the plaintiffs have alleged that they were registered Republicans who voted for Republican candidates in the Sixth District prior to 2011. *Second*, they have alleged that "the Maryland legis[a]ture expressly and deliberately considered Republican voters' protected First Amendment conduct, including their voting histories and political party affiliations, when it redrew the lines of the [Sixth] Congressional District; *and it did so with an intent to disfavor and punish those voters by reason of their constitutionally protected conduct.*" Second Am. Compl. ¶ 7(a) (emphasis added). *Third*, the plaintiffs have alleged that, precisely as intended, the "actual effect" of the Plan has been to "burden[ ] Republican voters in the former [Sixth] Congressional District" by "preventing [them] from continuing to elect a Republican representative to the United States House of Representatives, as they had in the prior ten congressional elections." *Id.* ¶ 7(b). And *fourth and finally*, the

plaintiffs have adequately alleged the causation element of a retaliation claim: they have alleged (1) that the State's redrawing of the Sixth District "cannot be explained or justified by reference to Maryland's geography or other legitimate redistricting criteria" and therefore that "the cracking of the [Sixth] District would not have taken place without the legislature's [deliberate] targeting of Republican voters on the basis of their First-Amendment-protected conduct," *id.* ¶ 120–21; and (2) that "but for the cracking of the district under the Plan," "Republican voters in the former [Sixth] District would have been able to elect a Republican representative in 2012 and 2014," *id.* ¶ 7(b). If the plaintiffs succeed in proving these allegations, they will be entitled to relief, unless the State can establish that the drawing of the Sixth District's lines was narrowly tailored to advance a compelling government interest.

Accordingly, the State's motion to dismiss the plaintiff's complaint for failure to state a justiciable claim is DENIED.

BREDAR, District Judge, dissenting:

I respectfully dissent: I would grant Defendants' motion to dismiss (ECF No. 51).[1]

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[1] In 2014, I presided over this matter while sitting as a single-judge court. Addressing Plaintiffs' claims as initially framed, I found the allegations wanting under the familiar *Twombly/Iqbal* standard, and—following then-controlling Fourth

I begin by emphasizing what this opinion does *not* stand for. This opinion is not a defense of the State's authority to segregate voters by political affiliation so as to achieve pure partisan ends: such conduct is noxious and has no place in a representative democracy. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) ("'[P]artisan gerrymanders,' this Court has recognized, '[are incompatible] with democratic principles.'" (alterations in original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion))). Nor do I seek in

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Circuit precedent—I both denied Plaintiffs access to a three-judge court and dismissed the case. *See Benisek v. Mack*, 11 F. Supp. 3d 526 (D. Md. 2014). These two rulings were summarily affirmed by the Fourth Circuit. *See Benisek v. Mack*, 584 F. App'x. 140 (4th Cir. 2014) (mem.). However, the Supreme Court of the United States later reversed the first ruling, holding that the Fourth Circuit had set too high a bar for access to three-judge district courts under 28 U.S.C. § 2284. The Supreme Court explained that the Fourth Circuit erred in *Duckworth v. State Administration Board of Election Laws*, 332 F.3d 769, 773 (4th Cir. 2003), in which case the Fourth Circuit had determined that, where a redistricting complainant fails to state a claim, by definition the complainant's pleadings are constitutionally insubstantial and "so properly are subject to dismissal by the district court without convening a three-judge court." *See Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) ("We think [the *Duckworth*] standard both too demanding and inconsistent with our precedents. '[C]onstitutional claims will not lightly be found insubstantial for purposes of' the three-judge-court statute." (alteration in original) (citation omitted)). Without "expressing any view on the merits" of Plaintiffs' claims, *id.* at 456, the Supreme Court remanded the case for proceedings before a three-judge district court. On remand, Plaintiffs sought—and received—this Court's permission to amend their Complaint substantially, and it is Plaintiffs' modified constitutional theory that now confronts the Court.

this opinion to understate the prevalence of political gerrymandering: there is no doubt in my mind that the problem is real and widespread and that entrenched Democratic and Republican state legislatures alike exercise their control over redistricting in an effort to promote party power. *See* Michael J. Kasper, *The Almost Rise and Not Quite Fall of the Political Gerrymander*, 27 N. Ill. U. L. Rev. 409, 419-23 (2007) (recounting the history of both Democratic and Republican gerrymandering efforts in Texas). Further, this opinion should not be read as a willing abdication of the judiciary's constitutional obligation to resolve cases and controversies, *see* U.S. Const. art. III, § 2, cl. 1, even when those cases and controversies involve politically charged subject matter. I have studied Plaintiffs' allegations and, in particular, their proposed First Amendment framework for resolving political gerrymandering claims. I accept, for purposes of this discussion, that the First Amendment may, as Justice Kennedy opined in *Vieth*, be the most "relevant constitutional provision in . . . cases that allege unconstitutional partisan gerrymandering," 541 U.S. at 314 (Kennedy, J., concurring in the judgment). I also assume, as I must on a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, that Plaintiffs' well-pleaded factual allegations are true: accordingly, I take as a given that the Maryland Governor's Redistricting Advisory Committee ("GRAC") "focused predominantly on the voting histories and political-party affiliations of the citizens of the State" with the "clear purpose and effect of diluting the votes of Republican voters and

preventing them from electing their preferred representatives in Congress." (ECF No. 44 ¶ 6.)

But even accepting that the First Amendment supplies the relevant constitutional principle, and even assuming that official misconduct may be afoot on the discrete facts of this case, I cannot responsibly endorse Plaintiffs' proposed standard (or otherwise approve continued litigation in this matter) unless I first conclude that the standard would be viable and manageable *throughout the life* of this case and *beyond the facts* of this case. Two substantial hurdles prevent me from drawing such a conclusion. The first hurdle relates to precedent: the Supreme Court has expressed some degree of tolerance for partisanship in the districting context, but that tolerance creates intractable line-drawing problems. A *per se* rule flatly prohibiting state legislatures from taking account of voting history or voter affiliation in their mapmaking would streamline the preliminary analysis, but it is not clear that such a rule is available in light of controlling law (or desirable in light of competing interests and objectives).

Even were this Court to implement such a *per se* rule, there remains a second, insurmountable barrier. Courts are simply not equipped to ascertain those unusual circumstances in which redistricting inflicts an actual, measurable burden on voters' representational rights. Yet that is precisely what the Supreme Court has required. *Compare Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion) ("We . . . agree . . . that in order to succeed the . . . plaintiffs were required

to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."), *and Vieth*, 541 U.S. at 295 (plurality opinion) ("This Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms."), *with League of United Latin Am. Citizens* [*LULAC*] *v. Perry*, 548 U.S. 399, 418 (2006) (Kennedy, J.) ("[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . . . show a burden, as measured by a reliable standard, on the complainants' representational rights."). Courts cannot reliably distinguish between what Plaintiffs would term impermissible "vote dilution" and the ordinary consequences of an American political process that is organic, fluid, and often unpredictable.

Constitutional adjudication in the federal courts (and particularly adjudication that has the potential to disrupt democratic process and delegitimize democratically elected officials) must not be inconsistent or *ad hoc* but must instead be "principled, rational, and based upon reasoned distinctions," *Vieth*, 541 U.S. at 278 (plurality opinion). Because Plaintiffs have not shown that their framework would reliably identify those circumstances in which voters' representational rights have been impermissibly burdened, and because I have been unable to discern an acceptable alternative framework, I conclude that Plaintiffs' claims are not justiciable.[2] Accordingly, I would now dismiss Plaintiffs'

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[2] While the majority is quite correct in its observation, *supra* at 25, that Justice Kennedy's First Amendment theory remains

controlling Second Amended Complaint with prejudice. Because I conclude that Plaintiffs' claims can *never* succeed, I would spare the parties the significant expense of discovery and end this case now. Offensive as political gerrymandering may be, there is nothing to be gained (and much to be lost) in postponing the inevitable.

I. Partisanship and Precedent

Before a court can craft a principled standard for rectifying a harm, it must grasp precisely what harm it is trying to rectify. Political gerrymandering claims have left courts in a quagmire because, on the one hand, courts recognize that districting is among the most inherently political ventures that state legislatures (and their agents) undertake; on the other hand, it goes without saying that the party in power has every incentive to design and implement a map that further entrenches its power. I am persuaded that *if* courts are to have any role in policing this process (an open question as far as I, and, it would seem, a majority of the Justices of the Supreme Court are

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"uncontradicted by the majority in any [Supreme Court] cases," *Shapiro*, 136 S. Ct. at 456, it does not follow, as the majority suggests, that Plaintiffs' Second Amended Complaint "adequately employs First Amendment jurisprudence to state a plausible claim for relief." As will be seen, Plaintiffs have failed to state a claim because they, like so many complainants in redistricting cases, have failed to proffer either a reliable standard for measuring the burden of political gerrymandering or allegations on which the Court could construct such a standard.

concerned[3]), courts must depart from ambiguous precedent and hold, as a first principle, that *any* manipulation on the basis of protected First Amendment conduct is presumptively impermissible. Under such a regime, if mapmakers were to take account of protected conduct in their districting, and if voters could thereafter point to actual, measurable harms flowing from such districting, the resulting maps would be invalid (or subject to the rigors of strict scrutiny that is, more often than not, fatal in fact).

To be clear, I am not proposing that courts *should* adopt such a *per se* rule: there are competing interests

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[3] There is much discussion in the case law and the scholarly literature about the meaning of *Vieth*, and in particular the meaning of Justice Kennedy's controlling opinion. While Justice Kennedy apparently remains open to the possibility that political gerrymandering claims may be justiciable, he did not opine that they necessarily *are* justiciable. On the contrary, he acknowledged that there are "weighty arguments for holding cases like these to be *nonjusticiable*" and that "those arguments may prevail in the long run." 541 U.S. 267, 309 (2004) (Kennedy, J., concurring in the judgment) (emphasis added). Justice Kennedy further opined that the "failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make [judicial] intervention improper," though he suggested that if "workable standards do emerge to measure these burdens," courts should stand ready to order relief. *Id.* at 317. The most that should be said, then, about Justice Kennedy's take on the justiciability of political gerrymandering claims, is that he has not absolutely ruled it out. Perhaps equally plausible is Justice Scalia's read of the Kennedy opinion, *i.e.*, that lower courts should treat the opinion as a "reluctant fifth vote against justiciability," a vote that "may change in some future case but that holds, for the time being, that this matter is nonjusticiable," *id.* at 305 (plurality opinion).

at stake, and indeed a rule that would preclude the kind of nefarious viewpoint discrimination Plaintiffs describe in their Second Amended Complaint might very well sweep up neutral or even useful political considerations. In a recent dissenting opinion in a malapportionment and racial gerrymandering case, Judge Diana Gribbon Motz of the Fourth Circuit described those political or quasi-political districting criteria that the Supreme Court has deemed legitimate, which include maintaining the competitive balance among political parties; avoiding contests between incumbents, provided that incumbents of one party are not treated more favorably than those of another; and preserving communities of interest. *See Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, No. 16-1270, 2016 WL 3568147, at *16 (4th Cir. July 1, 2016) (Motz, J., dissenting).

For present purposes, I am simply asserting that *if* courts are going to adjudicate or attempt to adjudicate political gerrymandering claims, they must begin with the proposition that mapmakers may not take account of First Amendment-protected conduct when drawing district lines. The problem, of course, is that I am not writing on a blank slate: even those Justices of the Supreme Court who have remained optimistic about the justiciability of political gerrymandering claims have nevertheless acknowledged the partisan realities of districting. *Vieth* is illustrative: while the decision was highly fragmented, each opinion can be read to include some recognition that partisanship in districting may be inevitable, if perhaps suboptimal.

See 541 U.S. at 285–86 (plurality opinion) (observing that the "Constitution clearly contemplates districting by political entities, and unsurprisingly that turns out to be root-and-branch a matter of politics"; further describing partisan motives as "ordinary and lawful" (citations omitted)); *id.* at 307 (Kennedy, J., concurring in the judgment) (explaining that whereas race is an "impermissible classification," politics is "quite a different matter," and agreeing that it would be "idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it" (citation omitted)); *id.* at 336 (Stevens, J., dissenting) (explaining that "[j]ust as race can be a factor in, but cannot dictate the outcome of, the districting process, so too can partisanship be a permissible consideration in drawing district lines, so long as it does not predominate"); *id.* at 343 (Souter, J., dissenting) (acknowledging that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent"); *id.* at 355 (Breyer, J., dissenting) (opining that "pure politics often helps to secure constitutionally important democratic objectives"). The Court has echoed this tolerance for partisanship in other cases and in related contexts, such as in its racial gerrymandering and malapportionment jurisprudence. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition. . . ."); *Shaw v. Reno*, 509 U.S. 630, 662–63 (1993) (White, J., dissenting) ("Because districting inevitably is the expression of interest group politics,

and because 'the power to influence the political process is not limited to winning elections,' the question in gerrymandering cases is 'whether a particular group has been unconstitutionally denied its chance to effectively influence the political process.'" (citations omitted)); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences."); *cf. Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) (assuming but nevertheless reserving the question whether partisanship is an "illegitimate redistricting factor").

In light of this authority, lower courts may be precluded from implementing a *per se* bar on partisan considerations in districting. That said, the Supreme Court may have been more willing to tolerate partisanship in weighing the merits of equal protection claims because, as Justice Kennedy observed, "[n]o substantive definition of fairness in districting seems to command general assent," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). The Court has never held that discernible political groups are entitled to proportional representation under the Fourteenth Amendment. Conversely, the First Amendment right is a sacrosanct individual right, and the Court has recognized that targeting on the basis of political viewpoint or affiliation *outside* the redistricting context presumptively violates the First Amendment. *See id.* at 294 (plurality opinion) ("[A] First Amendment claim, if

it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs." (citing *Elrod v. Burns*, 427 U.S. 347 (1976))). To date, the First Amendment framework in the redistricting context is nothing more (or less) than a "legal theory put forward by a Justice of th[e] Court and uncontradicted by the majority in any . . . cases," *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015). Unless and until a majority of Justices squarely confront the propriety of partisanship in reviewing a redistricting claim brought on First Amendment grounds, it may be possible for lower courts to implement a *per se* rule in this narrow context. *Cf. Vieth*, 541 U.S. at 294 (plurality opinion) ("It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable. To say that suppression of political speech . . . triggers strict scrutiny is not to say that failure to give political groups equal representation . . . triggers strict scrutiny.").

This discussion is not strictly academic. To accept that political manipulation is part and parcel of redistricting is to create an insuperable line-drawing problem: how much politicking is too much, and how do we know? From *Bandemer* to the present day, the Supreme Court has been unable to answer that question with anything resembling the degree of clarity lower

courts require in order to fairly adjudicate political gerrymandering claims. But if courts were to accept the premise that state authorities may no more use voter history and affiliation for mapmaking than they may use such data for hiring, firing, and contracting decisions, then courts would have, if nothing else, at least a plausible foundation on which to attempt to construct a standard.

Ultimately, I need not resolve this matter. Even were the Court to adopt a *per se* rule forbidding partisan manipulation in districting, I would nevertheless conclude that it is infeasible to ascertain the point at which voter manipulation produces a cognizable injury the likes of which courts are equipped to redress. If there is no provable burden, then there can be no judicial relief. *See id.* at 292 ("The issue . . . is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.").

II. Burden

Defendants in this case devoted much of their briefing—and a substantial portion of their oral argument—to pressing their contention that nothing about the GRAC's 2011 map chills voters' First Amendment rights: voters remain free to affiliate with the party of their choice, to vote, to run for office if they wish, and to participate in vibrant political debate wherever they find themselves. Candidly, I made a similar observation in dismissing Plaintiffs' original Complaint, *see*

Benisek v. Mack, 11 F. Supp. 3d 516, 526 (D. Md. 2014), *aff'd*, 584 F. App'x. 140 (4th Cir. 2014) (per curiam), *rev'd and remanded sub nom. Shapiro*, 136 S. Ct. 450. Since that time, Plaintiffs' theory of the case has evolved, and they now contend that the burden they (along with other Maryland voters) have suffered is not a direct restraint on their political activity but rather an indirect sanction for engaging in First Amendment-protected conduct. According to Plaintiffs, by consulting data on voting history and party affiliation and by strategically deploying that data in its mapmaking, the GRAC "diluted the votes of the minority party significantly enough that the dilution has inflicted a palpable and concrete adverse effect" (ECF No. 85 at 3) through the cracking of the 6th Congressional District.

For purposes of this discussion, I accept that the burden Plaintiffs allege they have suffered is an indirect burden and that, accordingly, much of Defendants' argument misses the mark. Likewise, much of the discussion in prior cases in which district courts have applied First Amendment principles in resolving political gerrymandering claims is only marginally relevant to the Court's analysis here: while plaintiffs in those prior cases have occasionally pleaded an indirect burden, presiding courts have generally focused on the absence of a direct restraint. *But see Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at *7 (N.D. Ill. Oct. 21, 2011) ("It may very well be that Plaintiffs' ability to *successfully elect* their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment

rights."); *Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, at *19 (N.D. Ga. May 16, 2006) ("What Plaintiffs demand is the right to have their views represented in state government by the representative of their choice. We decline to recognize such a right under the First Amendment.").

Nevertheless, even assuming that vote dilution (as Plaintiffs conceive of it) may amount to a constitutional harm,[4] I conclude that it is not a harm courts are

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[4] This, however, remains an open question: while malapportionment plainly harms the rights of those particular voters who are packed into overcrowded districts and whose votes are thereby literally diluted, it is less obvious that voters suffer individual harm simply because they are redistricted in such a way that their party of choice is less likely to prevail in congressional elections. Indeed, as Plaintiffs here seem to recognize, and as the majority acknowledges, *supra* at 17, "citizens have no *constitutional* right to reside in a district in which a majority of the population shares their political views and is likely to elect their preferred candidate." *See also Badham v. March Fong Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988) ("The First Amendment guarantees the right to participate in the political process; it does not guarantee political success."), *aff'd mem.*, 488 U.S. 1024 (1989). For this reason, I would hesitate to draw a parallel to the one-person-one-vote line of cases, as the majority has done.

Even if vote dilution, as described by Plaintiffs, does amount to a constitutional harm, I greatly doubt that such a harm is of the same order as the harm citizens suffer in the context of political patronage, the doctrinal comparator on which Plaintiffs largely rely. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 563 (2004) ("[T]he burden that the plaintiffs in the patronage cases experienced fell on them outside the political process: they lost jobs as public defenders or road workers or were denied contracts to haul trash or tow cars. . . . By contrast, in a political gerrymandering case, the question whether 'an apportionment

currently equipped to redress: I can ascertain no reliable, administrable standard, and Plaintiffs have proposed none, for distinguishing electoral outcomes achieved through political gerrymandering from electoral outcomes determined by the natural ebb and flow of politics. Short of exposing voters and their private voting decisions to involuntary interrogative discovery—an obviously impractical and fundamentally undemocratic undertaking—it is simply not feasible to reverse-engineer elections so as to determine whether the State's dilutive efforts imposed a "real and concrete adverse impact on supporters of the disfavored political party" (ECF No. 68 at 8).

The problem lies in the nature of political affiliation itself. Unlike race, one's status as a Republican or a Democrat is not, as Justice Scalia put it, an "immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Vieth*, 541 U.S. at 287 (plurality opinion). Justice O'Connor made a similar point in *Bandemer*, writing that "while membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties. Consequently, the difficulty of measuring voting strength is heightened in the case of a major political party." 478 U.S. at 156 (O'Connor, J., concurring in the judgment). Maryland's 6th Congressional District is illustrative: while in 2012

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has the purpose and effect of burdening a group of voters' representational rights' requires deciding what voters' 'representational rights' are." (footnote omitted)).

the Democratic challenger, John Delaney, defeated Roscoe Bartlett, the incumbent Republican, by an almost twenty-one percent margin of victory, just two years later Delaney beat Republican challenger Dan Bongino by a mere 1.5%.[5] Thus, while the majority sensibly contends that the State may not "intentionally drown out the voices of certain voters by reason of their views," *supra* at 598, the problem with Plaintiffs' theory (and, more broadly, with *all* political gerrymandering claims, whether brought on First Amendment or equal protection grounds) is that courts are not equipped to distinguish those circumstances in which the State has drowned out particular voices from those circumstances in which the chorus has voluntarily changed its tune.

Because of the inherent mutability of political affiliation, the Court cannot simply compare the results of an election conducted pursuant to Map X with those of a subsequent election conducted pursuant to Map Y and blame any shift in power on redistricting: each election cycle is unique, and voter behavior is as unpredictable as the broader societal circumstances that may make one candidate, or one party, more appealing than the other to particular voters and communities. For that matter, treating a prior map as a baseline for measuring the constitutionality of a subsequent map

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[5] These statistics are publicly available at http://elections.state.md.us, and may be considered at the Rule 12(b)(6) stage. *See Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (explaining that, where voter statistics are publicly available at state legislative website, courts may take judicial notice of this information on motion to dismiss).

assumes that the prior map was itself free of impermissible manipulation—yet we know, as a practical matter, that gerrymandering is widespread in our political system and as old as the Republic. *See* Kasper, *supra*, at 411; *cf. LULAC*, 548 U.S. at 446 (Kennedy, J.) ("There is no reason . . . why the old district has any special claim to fairness.").[6]

Plaintiffs hasten to reassure the Court that, whatever the boundaries or implications of their proposed standard in other, future cases, in *this* case the answer could not be clearer: through savvy political engineering, the State cracked a congressional district and wrested a seat from long-held Republican control. I am compelled to wonder how Plaintiffs might seek to *prove* that claim: Plaintiffs, after all, are just nine committed or occasional Republican voters residing in two districts comprising many hundreds of thousands of residents. Plaintiffs could take the stand and testify about their personal voting histories, and they could perhaps

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[6] The majority acknowledges, *supra* at 598, that a prior map "may well have been drawn for partisan reasons, and the State can redraw its boundaries for any number of reasons" so long as those reasons do not include partisan retaliation. But my point here goes, once again, to the question of burden: if Map X was badly gerrymandered to advance Republican interests, and Map Y is thereafter designed to promote Democratic interests, I am not certain that Republican voters who may have been indirectly impacted by the redistricting initiative have suffered a burden for which the Constitution affords redress. Put differently, if political gerrymandering is as universal and longstanding a problem as Plaintiffs and *amici* suggest, then it may be unhelpful to treat any one particular map, which may have the effect of correcting for or offsetting a prior gerrymander, as imposing a particularized burden on a discrete partisan subset of the voting population.

invite their friends and associates to do so as well. But such testimony would shed no meaningful light on the circumstances surrounding the 2012 and 2014 congressional elections. Nor, for the reasons I have already set forth, would statistical sampling, voter registration history, or any other known data set provide reliable evidence from which the Court could ascertain whether *in fact* the alleged gerrymander was outcome determinative.

Even were I to presume on the unusual facts of this case—the broken-winged pterodactyl and so forth—that the gerrymander *was* outcome determinative, such a presumption would bring me no closer to a reliable framework that I, and other judges, might employ in future cases involving subtler partisan engineering. At bottom, Plaintiffs' purported standard is a variation on Justice Stewart's much-maligned adage, "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *Ad hoc* decision making and judicial stargazing cannot take the place of "clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights," as "[a]bsent sure guidance, the results from one gerrymandering case to the next would likely be disparate and inconsistent," *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment); *see also id.* at 291 (plurality opinion) (explaining that a reliable criterion is "necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts,

and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking").

III. Conclusion

There may yet come a day when federal courts, finally armed with a reliable standard, are equipped to adjudicate political gerrymandering claims.[7] Or perhaps political gerrymandering (at least in extreme cases) will be corrected by the voters themselves, who after all bear the ultimate power—if they unite—to bring about political change. *See Bandemer*, 478 U.S. at 144 (Burger, C.J., concurring in the judgment) ("In my view, the Framers of the Constitution . . . placed responsibility for correction of such flaws in the people,

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[7] In the absence of a reliable standard, the Supreme Court may nevertheless intervene—or, more likely, direct lower-court intervention—should a truly exorbitant fact pattern emerge. At oral argument in a case heard the same day as this matter, *Parrott v. Lamone*, Civ. No. GLR-15-1849, plaintiffs' counsel hypothesized that highly sophisticated demographic software might make it possible for blatantly partisan redistricting commissions to draw district lines between apartment units or rooms in a single-family home. The hypothetical is absurd, but the notion that sophisticated mapmakers could draw lines around favored (and disfavored) communities or even streets is not inconceivable. At some point, mapmaking that makes a mockery out of representative democracy may necessitate inelegant judicial intervention, and the Supreme Court may require lower courts to stand guard at the outer perimeter of rationality. *See Cox v. Larios*, 542 U.S. 947, 950 (2004) (Stevens, J., concurring) ("'[T]he unavailability of judicially manageable standards' cannot justify a refusal 'to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially.'" (citation omitted)).

relying on them to influence their elected representatives."). In any event, I am not persuaded that Plaintiffs here have discovered a viable solution. And even having accepted several of Plaintiffs' unproven premises for purposes of my analysis on this Rule 12(b)(6) motion (*i.e.*, that the First Amendment is the relevant constitutional provision, that vote dilution as Plaintiffs characterize it might amount to a constitutional harm, and that the GRAC acted with the purpose and effect of targeting Republican voters), I have been unable—like a majority of Justices and every lower court to take up the question since *Vieth*—to devise a standard on which courts might reasonably rely. Consequently, I must part company with my esteemed colleagues on the panel. I would dismiss Plaintiffs' Second Amended Complaint with prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No.:
DAVID J. MCMANUS, JR., *et al.*,	*	1:13-cv-03233-JKB
Defendants.	*	

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NOTICE OF APPEAL

(Filed Nov. 15, 2018)

PLEASE TAKE NOTICE that defendants Linda H. Lamone and David J. McManus, Jr, hereby appeal to the Supreme Court of the United States from this Court's November 7, 2018 opinion and order granting plaintiffs' motion for summary judgment and entering a permanent injunction (Dkts. 222, 223) and from each and every opinion or ruling that merged therein. This appeal is taken under 28 U.S.C. § 1253.

November 15, 2018 Respectfully submitted,

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